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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON

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April 20, 1951

RIGHTS-OF-WAY IN PATENTED LAND COVERED BY A LEASE OF RESERVED MINERALS

Rights-of-way in lands patented with a mineral reservation - Tunnels

Where land has been patented with a reservation of minerals and tunnels under the land have been constructed by a mineral lessee holding a lease under the act of February 25, 1920 (30 U.S.C. sec. 181 et seq.) or the act of February 7, 1927 (30 U.S.C. sec. 281), the Bureau may, without the consent of the owner of the surface or of the lessee, grant rights-of-way through the tunnels under any applicable right-of-way law, regardless of whether the right-of-way is to be used in connection with mining or not.

Such rights-of-way should not be granted by the Bureau if their use would materially interfere with the exercise of the lessee's rights under his lease.

Generally, where mineral deposits are owned separately from the surface, the owner of the mineral deposits owns any tunnels constructed in connection with mineral development until the mineral deposits are exhausted.

Attachment

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON

April 20, 1951

Memorandum

To: Regional Counsel, Region IV

From: Acting Chief Counsel

Subject: Right-of-way over land covered by a mineral lease.

Reference is made to your memorandum of September 22 inquiring whether there is authority of law for this Department to grant a right over or through lot 8 (SE¼SW¼) sec. 12, T. 13 S., R. 95 W., 6th P.M., Colorado. The memorandum is accompanied by a road right-of-way application, Colorado 01334, filed by Edwin Marsh, W.A. Hamilton and Walter Scott, under section 29 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 449; 30 U.S.C. secs. 181, 186). It appears from the application that the applicants own certain lands adjoining lot 8 and that they wish an "entry" on the lot, apparently a tunnel, in order to reach coal lands lying north and northeasterly of the lot, which lands the applicants either have purchased or leased from the owners.

The lot 8 is covered by homestead entry 041604 which was patented subject to a provision "excepting and reserving, however, to the United States all the coal in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove the coal from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of June 22, 1910 (36 Stat. 583)".

The lot is also covered by coal lease 036847 which was issued to Orlen Kitch under section 2 of the leasing act of 1920 and in accordance with section 29 of the leasing act, the lease contains a provision by which the lessor reserves "the right to permit for joint or several use such easements or rights-of-way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands confining the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes". An assignment of the lease to R. T. Clipp has been filed but it has not been approved.

Generally, the courts hold that where the coal deposits are owned separately from the surface, the owner of the coal deposits owns the tunnels until the coal deposits are exhausted (See 31 Yale L.J. 747. 154ALR957 (note)). While there may be some basis for questioning

reasoning upon which the rule is based and even though its results may not always appear logical, nevertheless, this was the general rule when the Mineral Leasing Act was enacted on February 25, 1920, and that Act should be construed in light of the rule.

Consequently, it is our view that the provisions of section 29 and of the lease reserving the right of the United States to grant rights-of-way through the leased deposits is applicable to tunnels which the mineral lessee constructs on the leased land even though the land has been patented with a coal reservation.

In view of the right expressly reserved to the lessor in all mineral leases under authority of section 29 of the leasing act, the Bureau may, without the consent of the lessee, grant rights-of-way or easements over or through the leased area under any applicable right-of-way law. The reserved right should not be exercised if the use of the rights-of-way will materially interfere with the exercise by the lessee of his rights under his lease. Such a right-of-way or easement may be granted regardless of whether it is to be used in connection with mining or private or government owned mineral deposits or whether it is to be used in connection with mining at all.

This opinion is applicable in principle to all leases issued under the act of February 25, 1920 (41 Stat. 437; 30 U.S.C. secs. 181, et seq), and the act of February 7, 1927 (44 Stat. 1057; 30 U.S.C. 281) affecting lands of the status referred to above.

(Sgd) James A. Lanigan

Acting Chief Counsel

Approved: April 23, 1951

(Sgd) William Zimmerman, Jr.

Assistant Director

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Los Angeles Contest
No. 6-715
Misc. 2107190
Inyokern Naval Reserve
5.04g

March 22, 1955 56 ?

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DECISION

United States - Contestant

vs. Mineral

Robert J. Kennedy - Contestee

Mineral Claims Declared Invalid

Pursuant to a field investigation and report, on November 25, 1947, adverse proceedings were ordered against the Argus, Apex, Deep Drift, Jumper,, Mexican, Number One, St. George Extension, St. Louis, Tuf Nut, Blue Belle and Blue Belle Extension lode mining claims of Robert J. Kennedy embracing land in unsurveyed secs. 7 and 8, T. 20 S., R 42 E., M.D.M., California, within the Inyokern Naval Reserve.

The proceedings were based upon charges preferred as follows:

1. That the land embraced within the claims is non-mineral in character, and the claims are therefore invalid.

2. That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery, and the claims are therefore invalid.

3. That the limits of the claims are not marked on the ground so that their boundaries can be traced, and the claims are therefore invalid.

As the whereabouts of the contestee could not be ascertained, the claims were declared null and void by decision dated November 2, 1949, which action was based on a publication notice. However, before decision of November 2, 1949, the address of the contestee had been ascertained and he was served with notice of the proceedings on March 22, 1949. The decision of November 2, 1949 was revoked by decision of January 19, 1950. He filed answer April 8, 1949 denying the charges and applying for a hearing. Hearing was held February 17, 1950 before Elizabeth G. Storey, Notary Public, at Los Angeles, California, when the Government represented by J. D. C. Thomas, attorney, and the contestee by Chester C. Kempley, attorney at law, appeared. The Government submitted testimony, and at the conclusion of which, attorney for the contestee asked for more time for his client to submit testimony. It was agreed that the contestee's testimony may be taken on written interrogatories, but he made no response. By decision dated January 9, 1951, the Manager declared the mining claims null and void from which the contestee appealed. Again the contestee was offered the opportunity to submit testimony, but the record fails to show he has taken any further action.

When the proceedings were initiated against the above named mining claims, the lands involved were within the Inyokern Naval Reserve. However, by Public Land Order No. 1005 dated September 3, 1954, the lands involved and other tracts were excluded from the Reserve.

A copy of a letter (Exhibit 14) signed by the contestee lists the rentals for the lands and cabins and houses on the claims used and occupied by the Navy. It also lists the amount covering the estimated value of loss, removal or destruction of tools, furnishings from the claims during the occupancy by the Navy. The amount claimed totals $28,795.34.

It is an elementary proposition that discovery of valuable mineral deposits in the form of a vein or lode is essential to establish the validity of a mining claim. East Tintic Consolidated Mining Claim, 40 L.D. 271 (1911). The test to be applied in determining whether a mineral deposit discovered on public lands is valuable, is whether it is such as would justify a person of ordinary prudence in the further expenditure of time and means in an effort to develop a paying mine. United States v. Maurita V. Dorn, A-26194 (September 26, 1951).

E. Rowland Traggit and Robert J. Smart, mining engineers, testified for the contestant that they visited and examined the claims; that samples were taken from the claims and assays made. The sample from the Argus claim showed a trace of gold, 0.25 oz. of silver; from the Apex, a trace of gold and 1.9 oz. of silver, a total value of $1.71 per ton; from the Deep Drift Lode, gold, 0.08 oz., silver, 0.32 oz. per ton, total value $3.09; from the Juniper Lode mining, 0.02 oz. of gold and 0.27 oz. of silver per ton, total value $1.12; from the Mexican Lode mining claim the development work was old and sloughed in. No samples were taken as no vein or lode could be found. From the Number One Lode, the sample showed 0.11 oz. of gold, value $3.85 per ton, silver nil; from the St. George Extension claim the sample showed 0.3 oz. gold per ton and 1.25 oz. of silver per ton, valued at $11.44. The improvement was found to be old. No development work of any kind was found on the St. Louis Lode claim, and no discovery. Stains of iron was found in the workings on the Tuf Nut mining claim. The workings were old and contained growth of vegetation. The cuts showed some quartz and an assay taken shows 0.01 gold and 5.01 oz. silver, valued at $4.88. Nothing was found on the Blue Belle and

Blue Belle Extension, only pictures were taken of the two claims. The witnesses also testified that the showing of mineral on the claims would not justify a prudent man in spending further time and money with a reasonable hope of developing a paying mine.

Moreover, the contestee offered no evidence in support of his claims, either at the hearing or otherwise, and his failure to do so is considered as an admission of the truth of the charges. It is the conclusion of this office that a valid discovery of mineral has not been made on the claims, and for that reason they are invalid.

The record fails to disclose that the contestee was ever actually excluded from going onto the land during the time it was within the Reserve. Since the claims are considered invalid for lack of a discovery of valuable mineral deposits, the contestee has no right to ask for rental for the land. As to the loss of tools, removal or destruction of any property of the contestee, his remedy for recovery of the value of such lies in the court of competent jurisdiction, and not before this Department.

In view whereof the decision appealed from is affirmed. Accordingly the Argus, Apex, Deep Drift, Jumper, Mexican, Number One, St. George Extension, St. Louis, Tuf Nut, Blue Belle and Blue Belle Extension mining claims are declared null and void and case closed, which action will become final after 30 days from receipt of notice hereof by the contestee. The right of appeal is allowed. If an appeal is filed, it must conform to the regulations contained in the attached copy of Circular No. 1818.

Edward Woozley
Director

Attachment: Circular 1818

Distribution:

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Contest No. 5037
Los Angeles 087445
087454-7
5.04g

March 20, 1956

DECISION

Walter E. Matthews, Contestant

vs.

J. R. Gillbergh, et al, Contestees

Mineral - Gypsum

and

United States, Intervenor

Mineral Claims Involved
Declared Null and Void
Case Closed

On March 7, 1949 Walter E. Matthews filed a protest affidavit in the Sacramento Land Office, California, against the issuance of oil and gas leases under offers Sacramento 037425, 037456 and 037302, now Los Angeles 087454, 087457 and 087445, respectively. The protest was based on the charges that the protestant owns valid placer mining claims Quotal Nos. 1 to 6, inclusive, for gypsum deposits, which cover a part of the lands described in the offers; that the mining locations were initiated prior to the offers and that the offers be rejected to the extent of their conflict with his claims.

Pursuant to notice, a hearing was set February 8, 1950 before the Manager, Land Office, Los Angeles, California, when the United States as Intervenor, by its representative and the contestees appeared and submitted evidence, while no appearance by or in behalf of Walter E. Matthews, contestant, was made. Since the contestant did not appear, the Intervenor, after introducing testimony of its mining engineer, who had examined the claims and found Quotal Nos. 1 and 3 placer claims to be valid and Quotal Nos. 2, 4, 5 and 6 placer claims to be invalid, moved for a judgment by default.

By decision dated August 17, 1953, the Manager held, after a review of the testimony, that no valid discovery of mineral had been made on the Quotal Nos. 2, 4, 5 and 6 placer mining claims; that there were not sufficient indications of mineral to warrant a prudent

man in spending his time and money to develop them, and recommended that Quotal Nos. 2, 4, 5 and 6 placer claims be declared null and void. The Manager recommended also that Quotal Nos. 1 and 3 placer mining claims be declared valid mining claims.

Walter E. Matthews, contestant, received a copy of the decision of August 25, 1953, and in response by letter dated August 31, 1953, he stated that the claims have commercial value; that one company has taken an option on the claims; that another company used 60 tons of gypsite (in 1952) for its ranch and plans on taking more, and that he challenged the testimony of J. R. Gillbergh cited in the decision that no indications of assessment work was seen on the claims. In reply to the contestant's letter, the Manager on September 4, 1953 informed him that "* * * through inadvertence the last paragraph of the decision was erroneously written. Since you failed to appear at the hearing, you are not allowed an appeal from the decision. (See Sec. 221.49, Circ. 1749);" in view of which the Manager refused to consider the protest. The contestant has made no response. Neither did he make any reference about his failure to appear at the hearing.

The rules of the Department relating to the effect of failure to answer or to appeal are set out in 43 CFR 1954, Supp. 221.49, and provide that no person who has failed to appear at the hearing "* * * shall be allowed an appeal from the final action or decision of the Manager." This regulation is direct and positive. The objections made in the contestant's protest against the Manager's decision are untimely. Since he did not appear and present them at the hearing or prior to the initial decision in the case, it is too late now to present them. By his failure timely to object, the contestant has waived any right to do so. Thus the decision of the Manager, as amended September 4, 1953, is affirmed.

The record is returned. The Manager will close the record for failure of the defendant to appear at the hearing or to appeal within the time allowed after notice of the decision. The Manager will take appropriate action on the offers as to the two valid placer claims and act on them as to the remaining land applied for.

Edward Woozley
Director

Distribution:

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UNITED STATES
DEPARTMENT OF THE INTERIOR
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Washington 25, D. C.

In reply refer to:
Contest No. 6734
(California)
5.04g

March 20, 1956

DECISION

United States, Contestant

vs. Mineral Placer Claims

Clem V. Svoboda, Contestee

Mineral Claims Declared Null and Void
Case Closed

By letter dated June 16, 1952, the United States, through the Manager of the Land Office at Los Angeles, California, instituted adverse proceedings attacking the validity of 6 placer mining claims owned by Clem V. Svoboda, and designated as Bentinite, Tip Top, Soda King, Labor Day, West End, and In Between. The claims were located for deposits of bentonite and are situated in what will be, when surveyed, secs. 26 and 27, T. 28 S., R. 46 E., M.D.M., California. The adverse proceedings attacked the validity of the claims on the grounds (1) that the lands embraced within the claim or claims are nonmineral in character; and (2) that minerals have not been found within the claim or claims in sufficient quantities to constitute a valid discovery.

Mr. Svoboda filed an answer to the charges, through his attorney, on July 16, 1952, and a contest hearing was held before the Manager of the Land Office on April 23, 1953. In a decision dated July 21, 1953, the Manager held that the government had proven its case, and that the claims are invalid for lack of discovery of a valuable mineral deposit; consequently, it was recommended that the claims be declared null and void. In accordance with 43 CFR 221.41 the decision allowed the contestee 15 days in which to move for a new trial upon the ground of newly discovered evidence, or 30 days in which to appeal to the Director of the Bureau of Land Management.

Since the contestee neither moved for a new trial, nor appealed to the Director within the time allowed, the regulation 43 CFR 221.51(a) is applicable, viz:

> "(a) When any party fails to move for a new trial or to appeal from the decision of the manager within the time specified, such decision shall, as to such party, be final and will not be disturbed except in case of fraud or gross irregularity."

An examination of the record does not disclose any evidence of fraud or of gross irregularity.

Accordingly, the decision of the Manager declaring the claim null and void is final, and the case is closed.

Edward Woozley
Director

Distribution

Mr. C. E. Crowley, Atty. for Contestee
Mr. Clem V. Svoboda
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Washington 25, D. C.

In reply refer to:
Contest No. 5037
Los Angeles 087445
087454-7
5.04g

March 20, 1956

DECISION

Walter E. Matthews, Contestant

vs.

J. R. Gillbergh, et al, Contestees

and

United States, Intervenor

Mineral - Gypsum

Mineral Claims Involved
Declared Null and Void
Case Closed

On March 7, 1949 Walter E. Matthews filed a protest affidavit in the Sacramento Land Office, California, against the issuance of oil and gas leases under offers Sacramento 037425, 037456 and 037302, now Los Angeles 087454, 087457 and 087445, respectively. The protest was based on the charges that the protestant owns valid placer mining claims Quotal Nos. 1 to 6, inclusive, for gypsum deposits, which cover a part of the lands described in the offers; that the mining locations were initiated prior to the offers and that the offers be rejected to the extent of their conflict with his claims.

Pursuant to notice, a hearing was set February 8, 1950 before the Manager, Land Office, Los Angeles, California, when the United States as Intervenor, by its representative and the contestees appeared and submitted evidence, while no appearance by or in behalf of Walter E. Matthews, contestant, was made. Since the contestant did not appear, the Intervenor, after introducing testimony of its mining engineer, who had examined the claims and found Quotal Nos. 1 and 3 placer claims to be valid and Quotal Nos. 2, 4, 5 and 6 placer claims to be invalid, moved for a judgment by default.

By decision dated August 17, 1953, the Manager held, after a review of the testimony, that no valid discovery of mineral had been made on the Quotal Nos. 2, 4, 5 and 6 placer mining claims; that there were not sufficient indications of mineral to warrant a prudent

man in spending his time and money to develop them, and recommended that Quotal Nos. 2, 4, 5 and 6 placer claims be declared null and void. The Manager recommended also that Quotal Nos. 1 and 3 placer mining claims be declared valid mining claims.

Walter E. Matthews, contestant, received a copy of the decision of August 25, 1953, and in response by letter dated August 31, 1953, he stated that the claims have commercial value; that one company has taken an option on the claims; that another company used 60 tons of gypsite (in 1952) for its ranch and plans on taking more, and that he challenged the testimony of J. R. Gillbergh cited in the decision that no indications of assessment work was seen on the claims. In reply to the contestant's letter, the Manager on September 4, 1953 informed him that "* * * through inadvertence the last paragraph of the decision was erroneously written. Since you failed to appear at the hearing, you are not allowed an appeal from the decision. (See Sec. 221.49, Circ. 1749);" in view of which the Manager refused to consider the protest. The contestant has made no response. Neither did he make any reference about his failure to appear at the hearing.

The rules of the Department relating to the effect of failure to answer or to appeal are set out in 43 CFR 1954, Supp. 221.49, and provide that no person who has failed to appear at the hearing "* * * shall be allowed an appeal from the final action or decision of the Manager." This regulation is direct and positive. The objections made in the contestant's protest against the Manager's decision are untimely. Since he did not appear and present them at the hearing or prior to the initial decision in the case, it is too late now to present them. By his failure timely to object, the contestant has waived any right to do so. Thus the decision of the Manager, as amended September 4, 1953, is affirmed.

The record is returned. The Manager will close the record for failure of the defendant to appear at the hearing or to appeal within the time allowed after notice of the decision. The Manager will take appropriate action on the offers as to the two valid placer claims and act on them as to the remaining land applied for.

Director

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Mr. Sam J. Whiting
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Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Contest No. 5037
Los Angeles 087445
087454-7
5.04g

March 20, 1956

DECISION

Walter E. Matthews, Contestant

vs.

J. R. Gillbergh, et al, Contestees

and

United States, Intervenor

Mineral - Gypsum

Mineral Claims Involved
Declared Null and Void
Case Closed

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Edward Woozley
Director

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UNITED STATES
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Bureau of Land Management
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In reply refer to:
Contests 6752, 6753, 6761
Los Angeles 094367, 094368
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DECISION

United States of America

Contestant

vs.

Mineral Patent Applications

Alonzo A. Adams
Lula Harris,

Contestees

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Manager's Decision Modified
Claims Declared Null and Void
Mineral Patent Applications Rejected

Alonzo A. Adams and Lula Harris filed mineral patent applications Los Angeles 094367 for the Danforth No. 1 Placer, Wild Horse Placer and Lucretia Placer claims, Los Angeles 094368 for the Gold Butte No. 1 Placer, Gold Butte No. 2 Placer, Gold Butte No. 3 Placer and Midget No. 2 Placer claims, and Los Angeles 0100750 for the Midget No. 1 Placer mining claim, involving lands in secs. 3, 10, 15, 16 and 21, T. 5 N., R. 16 W., S.B.B. & M., California, under the provisions of the United States Mining Laws (30 U.S.C., 1952 ed., sec. 21 *et seq.*). Contests 6752, 6753 and 6761 were initiated against each of the claims based upon charges asserted by the United States Forest Service that (1) a bona fide discovery of mineral has not been made; (2) the land is non-mineral in character, and (3) the application has not been made in good faith for mining purposes, and with respect to the Wild Horse, Lucretia, Gold Butte No. 1, Gold Butte No. 3 and Midget No. 2 placer claims, also that (4) $500 in development work has not been expended on or for the benefit of the claims. A consolidated hearing on these issues was held before the Acting Manager of the Los Angeles Land Office on January 27 and 28, 1954. By a decision dated October 13, 1954, the Manager of the Los Angeles Land Office, after reviewing the testimony held that the "Government's charge is fully sustained" and that the "application for patent" should be denied and the "mineral entry" should be cancelled.

The contestees have appealed from this decision. A brief in support of the appeal was filed with the record on December 7, 1954. The appellants contend in substance that the Manager's decision was erroneous in that the charges asserted against the claims are not supported by the evidence and in fact that the evidence produced by the contestees refutes the charges brought against the claims. The appellants state that the decision does not show clearly upon which of the charges the Manager's decision was based, that the Manager's decision took into account only evidence which was submitted at the hearing, affidavits and reports submitted with the mineral patent applications not being considered, and further that no reference was made to evidence which showed values between 60 cents and $6.00 per yard had been discovered on the claims. Evidence submitted by the contestees' mining engineer was summarized in the brief on appeal, as were statements made by contestee Adams as to values recovered from the claims and values contained in samples from the claims. The appellants further stated that the Government witness was permitted to give his opinion on the issues involved in the contests, without proper foundation or basis.

On December 22, 1954 a reply brief was filed by the contestant.

A review has been made of the record of the hearing, including the evidence offered by the parties. It is noted the parties agreed to incorporate into the hearing record as testimony of the contestees' mining engineer his report of examination of the claims, contained in the mineral patent application records. The evidence in that report as to samples taken from the claims was evaluated in the Manager's decision, along with the mining engineer's general testimony that he believed further prospecting was warranted on the claims. The statements of contestee Adams as to values recovered from the claims, as shown in receipts from sales of gold (contestees' Exhibit H), and as estimated from his recollection of work performed by his former partner and predecessor in interest, and his statements of values found in samples taken from the claims, including his estimate of recovery values of 60 cents to $6.00 per yard from the Midget No. 1 claim, are not referred to in the Manager's decision and they apparently were not accorded any evidenciary value. The rejection of this testimony appears proper since the statements are unsupported by other evidence and the receipts referred to were not identified sufficiently to establish that the gold they relate to was recovered from the claims here involved. It is noted Mr. Adams stated records of values recovered from the claims and records of sampling were lost when his partner and predecessor in interest died in 1936, and that his testimony on this issue was based largely upon his recollection. In answer to the contestees' challenge of the Government's witness as an expert, the foundation for his qualification as an expert witness is established in the record and his expert opinion on the issues was therefore properly considered by the Manager.

Under the United States Mining Laws a valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. (30 U.S.C., 1952 ed., secs. 22 and 35). The mining laws applicable to placer claims provide that such placer claims "shall be subject to entry and patent under like circumstances and upon similar proceedings as are provided for vein or lode claims." (30 U.S.C., 1952 ed., sec. 35). This provision of the mining laws has been construed as meaning that a valid discovery such as will support a mining location must be of a valuable deposit such as would warrant a prudent man in the expenditure of his time and money in an effort to develop a paying mine. East Tintic Consolidated Mining Company (43 L.D. 79). The authorities relied upon by the parties adhere to this rule except for the case of Book et al v. Justice Mining Company (58 Fed. 106), cited by the contestees, holding a discovery is valid where the mineral is found in rock in place, regardless whether the value is high or low. The Department has held in the case of United States v. Catherine Ryan, A-23326, September 18, 1942, that this ruling is not in accord with the rule of discovery applied by the Department and approved by the Supreme Court. See Chrisman v. Miller (197 U.S. 313) and Cameron v. United States (252 U.S. 450).

Applying the rule of discovery to the facts as adduced at the hearing, showing extremely low values in the claims for gold, the mineral for which the claims were located, it must be concluded that bona fide discoveries sufficient to support valid locations have not been made and that the lands are not sufficiently mineralized to sustain valid locations. The expert testimony of both contestees' and contestant's mining engineers appears to support these conclusions, in that the contestant's witness stated further expenditures in an effort to develop a paying mine would not be warranted from the evidence at hand and the contestees' witness stated he believed further examination and sampling should be made of the property to determine whether additional expenditures would be warranted. It must be held, therefore, that the charges of the Forest Service that bona fide discoveries have not been made on the claims and that the lands are non-mineral in character, have been sustained.

On the question of the value of the development work performed upon the Wild Horse, Lucretia, Gold Butte No. 1, Gold Butte No. 3 and Midget No. 2 placer claims, the record shows that the Forest Service charge that $500.00 in development work had not been expended on or for the benefit of each of these locations was intended to apply to the period subsequent to the amendment of the locations in 1936. At the hearing and in the reply brief filed by the contestant, it was conceded by the Forest Service that the requisite development work was performed on the claims if the work thereon prior to 1936 may be considered applicable to the amended locations through a proper chain of title for the period of such improvements in the present claim owners. No abstract of title to the claims has been submitted with the mineral patent applications; consequently it is not possible to make a determination on this issue.

Considering the charge of the Forest Service that the mineral patent applications were not made in good faith in that the lands were not sought for mining purposes, the evidence is inconclusive. The regulations (43 CFR 185.71) require that placer applications include data to support the claim that the lands are sought in good faith because of the mineral therein. In this connection it appears that the claimants furnished a report of examination of the claims by a mining engineer. This report enumerated the considerable expenditures on the claims as evidence of the good faith of the claimants, and at the hearing the mining engineer who prepared the report, appearing as witness for the contestees, testified his examination of the claims and preparation of the mineral patent applications for the contestees were made after he had observed the good faith of the claimants. The contestees have explained that their letter in 1949 to former President Truman, requesting agricultural patents to the lands, was a mistake because of poor advice from a real estate agent. The contestant had considered this letter as an acknowledgment that the lands were not mineral in character and therefore prima facie evidence that the lands were not sought in good faith for mining purposes.

In view of the findings herein that the lands are non-mineral in character and that bona fide discoveries have not been made on the claims, it is necessary to declare the claims null and void, in addition to rejecting the mineral patent applications as recommended in the Manager's decision. The Manager's decision is modified to this extent. Accordingly, the claims are hereby declared null and void and the mineral patent applications are rejected subject to the right of the parties in interest to appeal herefrom to the Secretary of the Interior within 30 days from notice. Any appeal filed must conform to the requirements outlined in the attached Circular No. 1818.

Eugene Falck
Acting Director

Attachment: Circular 1818

Distribution:

Hon. James Roosevelt
Mr. Milton Wichner, Atty. for Contestees (Registered Mail)
Solicitor, U.S. Dept. of Agriculture, San Francisco, Calif. (Registered Mail)
Alonzo A. Adams, Contestee (Regular Mail)
Lula Harris, Contestee (Regular Mail)
Each AO (3)
Each SO (3)
Each LO (3)
Geological Survey (3)
Minerals Staff Officer (3)
Case File
FSRD
BLM Reading File
Attorneys' Reading File
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Alaska OS
Area Cousel (Anchorage) 2
L & M Officer (Anchorage) 2
District Manager (Juneau) 2

LO (Sacramento)

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SACRAMENTO, CALIF.
MAY 15 1956

In reply refer to:

Los Angeles 085390
Contest No. 6735
U ADJUSTMENTS - Angeles
Forest Service -
Calif. Region
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 30, 1956

Registered Mail
Return Receipt Requested

DECISION

United States, Contestant	:	
	:	
vs.	:	Mineral
	:	
Roy W. Spurrier, Contestee	:	

Mineral Application Held for Rejection

Roy W. Spurrier has appealed from the decision of the Manager dated February 3, 1953, which held that no valid discovery of mineral had been made on his placer mining claims, Coarse Gold Nos. 1 and 2, and recommended that the application Los Angeles 085390, for patent to the claims, be denied. The two claims cover lands in sec. 29, T. 5 N., R. 15 W., S.B.M., Sierra Peloma Mining District, Los Angeles County, Angeles National Forest, California.

The proceedings are based upon charges of the Forest Service, Department of Agriculture, as follows:

1. No discovery of mineral has been made.

2. The land is non-mineral in character.

On July 10, 1952, a notice of the charges was sent to the Contestee and in due time an answer was filed denying the charges and requesting a hearing. The hearing was held on December 2, 1952, before the Manager, Land Office, Los Angeles, California, at which time and place the Government by its attorney, David Kaplan, and the Contestee by Francis Gherini, his attorney, appeared and submitted evidence.

80

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. United States v. M. W. Mouat, et al., A-26181 (May 16, 1951). In determining whether mineral deposits discovered on public lands are valuable, the test to be applied is whether they are ". . . such as would justify a person of ordinary prudence in further expenditure of his time and means in an effort to develop a paying mine." Cameron et al v. United States, 252 U.S. 450, 459 (1920).

In an opening statement, before any of the witnesses testified, attorney for the Contestee stated in effect that the mineral character of the land embraced in the claims is a matter of record in the Bureau of Land Management, that the mining location was made before the establishment of the National Forest, and therefore Contestee's title is prior, and that the required procedural due process of law was not complied with in that the Contestee was not served with a copy of the Forest Service's protest. These points are also discussed in Contestee's appeal.

William C. Sanborn, mining engineer for the Forest Service, testified that he examined the claims in April 1950; that he took 10 samples from materials exposed in the cuts and works; that because no water was available on the claims the samples were panned at a Ranger Station; that several of the samples showed some color or a few specks of gold, valued from 1 cent to 6 cents per cubic yard, the remaining samples showing no trace of gold; that in view of which he found no justification for a prudent man to spend his time and effort in developing a paying mine, and that the land was not mineral in character and no discovery had been made.

Robert J. Smart, mining engineer for the Bureau of Land Management, testified that he examined the claims in November 1952. He stated that Improvement No. 1 is an open cut 4 feet by 9 feet by 14 feet long, with loose rock at the back; that Improvement No. 2 is a tunnel containing eroded rock, the old part of which is filled with gravel and cannot be entered; that Improvement No. 3 is a shaft, and No. 4 is a tunnel 5 feet by 6 feet by 9 feet; that the assays of the four samples taken from these workings showed practically no gold, but were estimated from 70 cents to 91 cents per ton, and such values were considered too low to mine; that the rock all through the claims showed some mineral which would be too low to operate under lode conditions, and that there is no water on the claims for placer mining operations and none nearer than a mile away. He estimated the cost for mining the land under existing conditions at $4 per ton, and also stated that a prudent person would not be justified in spending time and effort in attempting to develop a paying mine on the claims.

Roy W. Spurrier testified that the claims had been worked since 1927; that he had taken about 3 oz. of gold from the claims during his ownership; that black sand and white rock have been found on the claims for which $200 per ton had been offered, provided sufficient tons were furnished; that other minerals - tungsten - platinum - porcelain clay, had been discovered on the land; that he believed the land to be mineral in character, and when asked by his attorney, "Do you believe that you are reasonably justified in developing them for profit?" his answer was: "They can be with water, yes, and also it can be done with a dry rocker in places. It wouldn't pay to run the dry rocker on it as a whole, because you would waste so much gold . . . ." (Tr. 69); and in (Tr. 80), in response to the question, "It is your opinion, then, that these claims cannot be worked economically unless a source of water supply be secured?", the Contestee answered: "Well, for placer gold alone you have got to have enough water to make any money to amount to anything, and a man could go up there and make a living and work after the heavy rains in Coarse Gold Gulch, but on the other hand, this here volcanic ash, I believe will pay off itself." He also testified that he had taken samples and had them assayed but he did not offer them in evidence. He further stated that he had not actually gotten to mining, because his operations on the claims had been prospecting, and that the assays he had made of the samples taken from the claims had been lost.

W. H. Barker, testifying for the Contestee, stated that he had found the white rock in several places on the claim, but did not know the extent of the material; that he had made a soap from the white rock (sample displayed); that he had an offer of financial backing to produce the soap, but he admitted that the offered assistance never materialized and that he had not sold any of the product.

Contestee asserts that the mineral character of the land in these claims has been determined in a court decision in an adverse claim suit.

The Department is not bound by a decision in an adverse suit except as to the right of possession. If it is found as a fact on competent evidence that the land is nonmineral, or that no discovery was made, there is no authority in law for issuing a mineral patent and the Department is not bound by a court decision to the contrary. Alice Placer Mine, 4 L.D. 314, Geo. G. Conway, Intervenor, v. Grosso, 53 I.D. 115-121.

The charges were made by the United States and they contain verbatim the exact language made in the protest. The claimant filed answer without objecting, thus joining issue on a matter essential to his right to a patent without raising the objection. Aside from the protest, it was the claimant's duty to satisfy the Government that his claim was valid. The effect of the charges made by the United States, if proved, would be that the claims were invalid. He was fully informed of the charges and does not show that he was injured in any way by the failure to serve a copy of the protest or prevented from or hindered in his defense. The failure to follow the prescribed procedure in detail is not sufficient to warrant remanding the case.

After having carefully considered the testimony in this proceeding, it is the conclusion of this office, that the evidence warrants a finding that the mineral, if any, discovered on the Coarse Gold. Nos. 1 and 2 placer claims is of such a nature that it lacks sufficient value to constitute valid mining claims. (*Big Pine Corporation*, 53 I.D. 410 - 1931), and accordingly, the value of such mineral does not come within the category of "valuable mineral deposits" which would "justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine." *Cameron, et al.*, *supra*. *United States* v. *Dawson*, 581 D. 670 (April 12, 1944). This being so, the Manager was correct in holding that the Contestant has sustained its charges.

In view of the foregoing, the decision of the Manager is affirmed. The application for patent to the Coarse Gold Nos. 1 and 2 placer mining claims is held for rejection, which action will become final 30 days after receipt of notice hereof. The right of appeal is allowed. If an appeal is filed, it must comply with the requirements of the regulations contained in the attached Circular No. 1818.

Edward Woozley
Director

Attachment: Cir. 1818

DISTRIBUTION:
Mr. Jesse R. Farr, Acting Reg. Atty. (3)
Mr. Francis Gherini, Atty. for Contestee (Registered Mail)
Mr. Roy W. Spurrier (Regular Mail)
Minerals Staff Officer (3)
Geol. Survey (3)
Each AO (3); Each SO (3); Each LO (3)
Alaska OS; Area Counsel (Anchorage) 2; L&M Officer (Anchorage) 2;
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RLW

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JUN 14 1956
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7 8 9 10 11 12 1 2 3 4 5 6

In reply refer to:

Mineral Contest No. 6724
Los Angeles 66198
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 1, 1956

DECISION

United States, :
Contestant :
: Mineral
v. :
:
Clyde W. Riggle, et al., :
Contestees

Contest Dismissed as to Comeback No. 2 Mining Claim

Departmental decision A-27184 of July 11, 1955, affirmed the decision dated February 21, 1955, of the Associate Director of this Bureau in the matter of Contest No. 6724, Los Angeles 66198, declaring all of the mining claims involved null and void except the Comeback No. 2 claim, as to which claim the case was remanded for a further hearing with respect to whether a valuable discovery of mineral was made prior to June 29, 1936, when the land involved was withdrawn from entry under the United States mining laws. The testimony presented at the hearing was reviewed in the Departmental decision, and it was concluded that there had not been a discovery of gold or garnet on this claim but that the evidence indicated a possibility that mica was discovered on the claim. The Departmental decision further stated with respect to all of the claims involved in the contest that at the most the evidence showed the claims are in a mineralized district, that the claims show mineralization which affords a promising opportunity, and that the appellants have worked hard over a period of years developing the claims and have placed improvements on the land.

Pursuant to the instructions contained in the Departmental decision, a supplemental field examination was made of the Comeback No. 2 claim in February and March 1956, and a report covering this examination has been received. From the evidence contained in the report it appears that no shipping ore is in sight on the claim. However, there are several tons of mica-bearing quartz exposed on the claim, the mine run mica-bearing quartz constituting at best 5 per cent mica and 95 per cent gangue, and there is an exposure of potash feldspar of less than half that of the mica-bearing quartz, the vein approximating 2½ feet wide by 5 feet long, being too narrow a band to be worked economically by itself. It would appear therefore that there is a possibility that these minerals might be produced from the claim but the most which can be said is that the available evidence presents a marginal or borderline case. However, the Government under all of the facts developed does not feel that it can support the burden of proof necessary to sustain a contest against the Comeback No. 2 claim in this case since under the prudent man doctrine which is still fully recognized by the courts and the Department (Chrisman v. Miller, 197 U. S. 313; East Tintic Consolidated Mining Company, 43 L.D. 79), a commercial deposit need not be shown to sustain a mining location, all that is necessary being a showing of mineral in such quantity and quality as to justify a prudent man in the expenditure of his labor and means in an effort to develop a paying mine.

Therefore, the contest is dismissed as to the Comeback No. 2 claim. The case is closed.

Byrne Falck
Acting Director

DISTRIBUTION:
- Mr. C. C. Pease, Attorney for Contestees (Regular Mail)
- The Attorney General, Washington, D. C. (Regular Mail)
- Each Contestee (Regular Mail)
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- Area Counsel (Anchorage) 2; L&M Officer (Anchorage) 2;
- District Manager (Juneau) 2; Minerals Staff Officer (3);
- Geological Survey (3)
- Case File
- Attorneys' Reading File
- BLM Reading File
- FSRD
- AU (25)
- FAP
- Mr. John Sieker, U.S.Forest Service, Wash.25,D.C. (7)

In reply refer to:

Contest No. 3896
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

DEPT. OF THE INTERIOR
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JUN 14 1956
BUREAU OF LAND MANAGEMENT
STATE OFFICE

RECEIVED
LAND OFFICE
SACRAMENTO, CALIF.
JUN 14 1956
A.M. 7 8 9 10 11 12 1 2 3 4 5 6 P.M.

June 6, 1956

DECISION

W. C. Dalzell : Mineral

Appeal Dismissed

W. C. Dalzell has filed an appeal to the Director from the decision of February 10, 1956, of the Hearings Officer which declared Campo Bello lode mining claim invalid.

The record discloses that notice of adverse charges was properly served on the Contestee and a timely answer was filed denying the charges.

A hearing was held on December 15, 1955, before a Hearings Officer, Bureau of Land Management, to determine the truth of the charges alleged by the Contestant. At the hearing an appearance was made on behalf of the United States by the Assistant Regional Solicitor, Department of the Interior, Sacramento, California. No appearance was made on behalf of the Contestee.

It is provided in 43 CFR Sec. 222.9 as follows:

> "If the entryman or claimant fails to deny the charges under oath and applies for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the Manager will forthwith close the case and notify the parties by registered mail of the action taken."

In the case of Los Angeles 087445, 087454-7, Contest No. 5037, the Director held in decision of March 20, 1956, that

"The rules of the Department relating to the effect of failure to answer or to appeal are set out in 43 CFR 1954, Supp. 221.49, and provide that no person who has failed to appear at the hearing.... 'shall be allowed an appeal from the final action or decision of the Manager.' This regulation is direct and positive. The objections made in the Contestee's protest against the Manager's decision are untimely. Since he did not appear and present them at the hearing or prior to the initial decision in the case, it is too late now to present them."

The notice of appeal did not contain any statement of the grounds upon which the appellant contends the Hearings Officer's decision is erroneous, and is also subject to dismissal for that reason. Hector Aitchison, A-27226 (November 21, 1956); O. J. Barnett, A-27036 (February 11, 1956); William C. Parson, A-27089 (April 12, 1955).

Accordingly, since no appearance was made at the hearing on behalf of the Contestee, without showing good cause therefor, and the notice of appeal did not contain any statement of the grounds upon which the appellant contends the Hearings Officer's decision is erroneous, the appeal is dismissed. The record is returned and the Manager, Land Office, Los Angeles, California, will close the record for failure of the defendant to appear at the hearing.

Edward Woozley
Director

DISTRIBUTION:
Mr. W. C. Dalzell (Regular Mail)
Field Commissioner, Graydon E. Holt, 1001 N.E. Lloyd Blvd.,Portland,Ore.
Each AO (3); Each SO (3); Each LO (3);
LO(Los Angeles) w/record L.A. Contest 3-896)
Minerals Staff Officer (3)
Geological Survey (3)
BLM Reading File; Attorneys' Reading File; Case file;
Alaska OS; Area Counsel (Anchorage) 2; L&M Officer (Anchorage) 2;
District Manager (Juneau) 2; AU (25).
PAS
Mr. John Sieker, Forest Service (7)

affirmed A 27444
7-22-57

In reply refer to:

Los Angeles 0140906
0133543

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 14, 1956

Registered Mail
Return Receipt Requested

DECISION

George W. and Alice Ann Rust :
Hugh and Ellen H. Jacks
Adverse Claimants, :

and : Mineral--Adverse Claim

California Perlite Corporation :
Mineral Applicant
:

Manager's Decision Reversed
Action on Adverse Claim Suspended

On April 3, 1956 George W. and Alice Ann Rust, Hugh and Ellen H. Jacks by Robert A. Fletcher, their agent, filed an appeal from the decision of the Manager dated February 24, 1956 rejecting their adverse claim Los Angeles 0140906 against mineral application Los Angeles 0133543 of California Perlite Corporation for patent to the placer claims known as the Klondike Nos. 1 and 2 covering the NE¼ and the SE¼ sec. 32 T. 8 N., R. 10 E., S.B.M. in San Bernardino County, California. The adverse claim was rejected by the decision on the grounds that since it was not filed until January 24, 1956 it was not timely filed. A brief in support of the appeal and a brief by the applicant in support of the Manager's decision have been filed.

Notice of the application for patent was published 60 days in a newspaper as required by the regulations Title 43 CFR sec. 185.56. The first publication was had November 24, 1955, and the last one on January 19, 1956. According to the notice the 60th and last day on which an adverse claim could be filed was January 23, 1956. The Land Office at Los Angeles is open to the public for filing of applications and for transaction of other business, during the established hours from 9:30 a.m. to 3:00 p.m. daily except Saturday and Sunday. At 3:40 p.m. January 23, 1956, Robert A. Fletcher, as agent for the adverse claimants presented the adverse claim to the Land Office for filing. The adverse claim was at that time left by the agent with the Land Office Officials who kept the document until the next day, January 24, 1956, when it was stamped as being filed at 9:30 a.m. of that day. The filing fee for the adverse claims, as required by regulations 43 CFR sec. 185.84 was paid February 21, 1956. In response to the Manager's decision dated January 31, 1956 proof of Fletcher's agency in behalf of the adverse claimants was filed February 15, 1956. A copy of the complaint to quiet title to the mining property No. 84574, Superior Court of the State of California, San Bernardino County filed by George W. Rust et al., and a copy of the summons issued by the Deputy Clerk of that court wherein the California Perlite Corporation is directed to appear and answer the complaint within 10 days, were filed with the Manager February 20, 1956. A copy of affidavit of Service of the Summons on the appellant has also been filed.

In the appeal, appellant's assert that the statute allowed 60 days within which to file an adverse claim, and that the appellants had until midnight of the last day to do that, or at least all of the normal business hours of the last day, that under the law and the administrative rulings of the Department of the Interior, the statutory right to file an adverse claim cannot be cut off at 3:00 p.m. in the afternoon of the last day provided by statute for the exercise of this right merely by virtue of an unpublished and unpublicized administrative practice of the local land office, and request that the decision appealed from be revised.

In the brief submitted Lester V. Peterman, attorney for the California Perlite Corporation in support of the Manager's decision, it is claimed that the adverse claim was not timely filed and that the filing fees for the adverse claim was paid too late.

When a mineral claimant begins proceedings for a patent, a speedy and adequate remedy is afforded by the law to quiet title of all adverse claim against his title, either by suit begun by an adverse claimant or by force of the bar of the statute. Such remedy is contained in U.S.C.A. Title 30 sec. 29, sec. 2325 U.S. Revised Statutes. This section reads in part, "If no adverse claim shall have been filed with the register of the proper Land Office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent" upon payment of the purchase price "and that no adverse claim exists * * * ".

A review of the patent application record discloses full compliance with the law and regulations relative to notice by publication. Section 185.79 of the regulations Title 43 CFR outlines the evidence that must be filed in support of an adverse claim. The adverse claimants have complied with this requirement.

In response to a letter dated April 12, 1956 from attorney for the California Perlite Corporation as to the authority for lishing the office hours at the Land Office, Los Angeles, the Manager replied by letter of April 13, 1956 as follows: "Office hours of the Bureau of Land Management, Land Office, Los Angeles, were established by State Order No. 10 dated April 29, 1955 issued by the State Supervisor, Bureau of Land Management, as follows:

Office Hours	Open to Public
8:30 a.m. -- 5:00 p.m.	9:30 a.m. -- 3:00 p.m.

In a letter of April 19, 1956, attorney for the mineral applicant asked the Manager whether order No. 10 establishing the above mentioned office hours had ever been published, and in reply the Manager stated that the order had not been published, and that under the procedures then in effect, no publication in the Federal Register is required. The Manager also stated that however, "under a recent ruling by United States District Judge Luther Youngdahl, United States District Court for the District of Columbia, in the case of John J. Farrelly and fifty-one oil companies v. Douglas McKay, Secretary of the Interior, Civil Action No. 3037-55, it would appear that such office hours will now be published in order to be effective. The Department is working on regulations to carry out this ruling".

Such regulations were approved by the Department June 21, 1956 43 CFR Part 101, Circular 1955, and filed in the Federal Register June 27, 1956 (Doc. 56-5099). The authority for these regulations is found in sec. 7 of the Federal Register Act of June 26, 1935 (49 Stat. 502-44 U.S.C. 307). Section 7 provides in part as follows: "No document required under sec. 5(a) of the act to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until copies of the document have been filed with the Federal Register and made available for public inspection". Section 5(a) of the same act provides that "there shall be published in the Federal Register * * * (3) such documents or classes of documents as the President shall determine from time to time to have general applicability and legal effect." Under the regulations approved by the President on August 25, 1941 (6 F.R. 4397-4407) all "orders, rules, regulations, and instructions of general applicability and legal effect, issued, prescribed or promulgated by the Secretary of the Interior and relating to the General Land Office" (now Bureau of Land Management), were determined to fall within this catagory. D. K. Edwards et al. v. Albert G. Brockbank et al.

business, during the established hours from 9:30 a.m. to 3:00 p.m. daily except Saturday and Sunday. At 3:40 p.m. January 23, 1956, Robert A. Fletcher, as agent for the adverse claimants presented the adverse claim to the Land Office for filing. The adverse claim was at that time left by the agent with the Land Office Officials who kept the document until the next day, January 24, 1956, when it was stamped as being filed at 9:30 a.m. of that day. The filing fee for the adverse claims, as required by regulations 43 CFR sec. 185.84 was paid February 21, 1956. In response to the Manager's decision dated January 31, 1956 proof of Fletcher's agency in behalf of the adverse claimants was filed February 15, 1956. A copy of the complaint to quiet title to the mining property No. 84574, Superior Court of the State of California, San Bernardino County filed by George W. Rust et al., and a copy of the summons issued by the Deputy Clerk of that court wherein the California Perlite Corporation is directed to appear and answer the complaint within 10 days, were filed with the Manager February 20, 1956. A copy of affidavit of Service of the Summons on the appellant has also been filed.

In the appeal, appellant's assert that the statute allowed 60 days within which to file an adverse claim, and that the appellants had until midnight of the last day to do that, or at least all of the normal business hours of the last day, that under the law and the administrative rulings of the Department of the Interior, the statutory right to file an adverse claim cannot be cut off at 3:00 p.m. in the afternoon of the last day provided by statute for the exercise of this right merely by virtue of an unpublished and unpublicized administrative practice of the local land office, and request that the decision appealed from be revised.

In the brief submitted Lester V. Peterman, attorney for the California Perlite Corporation in support of the Manager's decision, it is claimed that the adverse claim was not timely filed and that the filing fees for the adverse claim was paid too late.

When a mineral claimant begins proceedings for a patent, a speedy and adequate remedy is afforded by the law to quiet title of all adverse claim against his title, either by suit begun by an adverse claimant or by force of the bar of the statute. Such remedy is contained in U.S.C.A. Title 30 sec. 29, sec. 2325 U.S. Revised Statutes. This section reads in part, "If no adverse claim shall have been filed with the register of the proper Land Office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent" upon payment of the purchase price "and that no adverse claim exists * * * ".

A review of the patent application record discloses full compliance with the law and regulations relative to notice by publication. Section 185.79 of the regulations Title 43 CFR outlines the evidence that must be filed in support of an adverse claim. The adverse claimants have complied with this requirement.

In response to a letter dated April 12, 1956 from attorney for the California Perlite Corporation as to the authority for lishing the office hours at the Land Office, Los Angeles, the Manager replied by letter of April 13, 1956 as follows: "Office hours of the Bureau of Land Management, Land Office, Los Angeles, were established by State Order No. 10 dated April 29, 1955 issued by the State Supervisor, Bureau of Land Management, as follows:

Office Hours	Open to Public
8:30 a.m. -- 5:00 p.m.	9:30 a.m. -- 3:00 p.m.

In a letter of April 19, 1956, attorney for the mineral applicant asked the Manager whether order No. 10 establishing the above mentioned office hours had ever been published, and in reply the Manager stated that the order had not been published, and that under the procedures then in effect, no publication in the Federal Register is required. The Manager also stated that however, "under a recent ruling by United States District Judge Luther Youngdahl, United States District Court for the District of Columbia, in the case of John J. Farrelly and fifty-one oil companies v. Douglas McKay, Secretary of the Interior, Civil Action No. 3037-55, it would appear that such office hours will now be published in order to be effective. The Department is working on regulations to carry out this ruling".

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A-25960 (April 3, 1951). Under this regulation the regulations relating to office hours in the Bureau of Land Management must be filed for publication in the Federal Register in order to constitute valid notice to parties without actual knowledge, pursuant to Sec. 7 of the Federal Register Act.

In order for the order relating to the hours the local office is open to the public to constitute a valid notice as to persons not having actual knowledge of the order, copies of the order must be filed with the Federal Register in accordance with the act (44 U.S.C. 307), and the order is effective as to such persons from and after the date of filing (38 op. Attorney General 359 (1935)), Sec. 10 of the Federal Register Act. There is no evidence of record indicating that the adverse claimants had any prior actual notice of the order until they presented their adverse claim to the Manager, for filing. The correspondence cited above between the appellant's attorney and the Manager indicate that no one acting in behalf of the applicant had prior actual notice of the order.

Attorney for applicant states that the filing fees for the adverse claim was paid too late. The statutory provision in reference to fees in mining cases is found in the act of August 31, 1951 (5 U.S.C. 140). It is apparent that there is nothing mandatory as to the particular time at which the official fees are to be paid. The Departmental regulation (Title 43 CFR 185.84) requiring the payment of the filing fees at the time of filing the adverse claim is not mandatory in the sense that there can be no valid filing of such claims unless the fees are paid at the time of filing.

In the case under consideration, the Manager retained the adverse claim for filing, which in effect invited the correction of the omission to send the fees with it, an omission the adverse claimants promptly remedied when they learned of it. It is believed that, while the fees did not accompany the adverse claim, they were timely filed. Also while the Manager could have refused to accept and file an adverse claim after office hours on the last day in which it can be filed, he did retain it and in so doing it was in his custody on the 60th day of publication. The fact that the document was not stamped with a date until the next day is immaterial. The document for legal purposes had been timely presented. Giroux v. Scheurman 23 L.D. 546 (1896).

Under the facts presented in the record, it is held that the adverse claim was filed in time within the meaning of the law, and as it appears that suit was timely instituted on said claim and is pending in the Superior Court of the State of California in and for the County of San Bernardino County, the decision of the Manager appealed from is reversed and all further proceedings in the case are stayed until the controversy involved in the suit has been settled or decided by the court.

The right of appeal to the Secretary of the Interior is allowed. If such appeal is taken, it must be received in this office within 30 days from notice hereof and must be accompanied by a $5.00 filing fee in each case. Strict compliance must be made with 43 CFR Sections 221.31 to 221.35, inclusive, and other pertinent sections of the Rules of Practice, Circular 1950, effective May 1, 1956 as amended by Circular 1962, effective October 4, 1956. See Information Sheet attached.

In the event of an appeal, the adverse party to be served with notice thereof is California Perlite Corporation, 35 North Raymond Avenue, Pasadena, California.

Edward Woozley
Director

Attachment

DISTRIBUTION:

Robert A. Fletcher, Agent for adverse claimants (Registered Mail)
Hugh Jacks, Ellen H. Jacks, George W. Rust and Alce Ann Rust (Regular Mail)
Lester V. Petermann, attorney for California Perlite Corp., (Registered Mail)
California Perlite Corporation (Regular Mail)
Appeals List No. 1
Minerals Staff Officer (5)
BLM
Hamel, Park and Saunders, Attorneys at Law

Hon. John F. Baldwin

no appeal

In reply refer to:
Sacramento 044710
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 1, 1957

DECISION

Sandy Scott Caples : Mineral Patent Application

Supplemental Data Held Insufficient To Meet Requirements of Office Decision of February 4, 1955

By Director's decision of February 4, 1955 Sandy Scott Caples, applicant for mineral patent Sacramento 044710 involving a group of placer mining claims approximating 2,239.47 acres in secs. 4, 5, 8, 9, 16, 17 and 20, T. 14 N., R. 13 E., and sec. 32, T. 15 N., R. 13 E., M. D. M., California, situate within the Tahoe National Forest, California, was allowed 30 days from notice thereof within which to supplement the showing made in his mineral patent application to conform with the requirements of the regulations (43 CFR, Part 185), under penalty of final rejection of the application for patent. The decision referred to affirmed the decision of the Manager of the Land Office, Sacramento, California, under date of November 5, 1952, which held the application for rejection on the same basis, and it recited particulars in which the showing in the application was insufficient.

Additional time for compliance with the requirements of the regulations was allowed the mineral patent applicant by this office, and on June 30, 1955 there were received from the attorney for the mineral patent applicant (1) a supplemental statement identifying more or less generally areas on the various claims in which prospecting work was performed and in which alleged mineral values were recovered, (2) a large-scale explanatory sketch plat, in which these areas were delineated by cross marks and on which there were shown the channels referred to in the supplemental statement as well as the contact of lava flow and country rock referred to therein, and (3) a brief in support of the appeal. The supplemental statement contains very little information as to mineral values recovered from the claims and in fact the data which have been furnished in this regard are general and summary in nature rather than precise. The most definite reference to specific areas of discovery, required to be supplied under the pertinent regulations, as pointed out in the Director's decision of February 4, 1955, appears to be that contained in the following statement quoted from the data supplied: "Tests made on the entire area in the center of each 10 acres, measured from the section corners of the latest government survey, on each of the Blue Eyes Claims in 1951, showed from a trace to as high as $15 per cubic yard of material washed, and proved the existence of gold-bearing areas underneath the lava not yet reached by tunnels." In the brief supporting the appeal it is stated that bedrock on each claim varies from one foot to more than 100 feet. It is asserted also in the brief that old shafts and tunnels were cleared to admit inspection by representatives of the Forest Service in 1951, and that the mineral patent applicant is prepared to produce "samples taken on each 10 acres of the claims as evidence of the gold content of these mines, nuggets recovered by leasers, together with mint returns of latest operations" at such time as a hearing is scheduled to determine the validity of the claims.

In response to request by this Bureau, the Attorney in Charge, Office of the General Counsel, Forest Service, San Francisco, California, submitted on August 29, 1955 a memorandum in reply to the supplemental showing on appeal. It is noted that a copy of this memorandum was supplied the attorney for the mineral patent applicant. It appears from the data contained therein that an attempt was made by a representative of the Forest Service, in company with a Mr. Moore (who was made available as a guide by the mineral patent applicant's attorney) to locate the places of alleged discovery and to ascertain the nature and extent of the mineral deposits claimed to exist on the subject claims, from the information supplied by the mineral patent applicant, without success, this information being too indefinite and vague.

The supplemental data does not meet the requirements noted in office decision of February 4, 1955. Since the applicant has failed to complete his application as required by the regulations (43 CFR, Part 185), the rejection of the application must be upheld.

In the absence of an appeal herefrom to the Secretary of the Interior within 30 days from notice hereof, the rejection will become final and the case will be remanded to the Land Office at Sacramento for refunding of the purchase moneys paid with the application. If an appeal is taken herefrom, it must be received in this Office within the time specified and must be accompanied by a filing fee of $5.00.* Strict compliance must be had with 43 CFR 221.31 through 221.35 and other pertinent sections of the Rules of Practice, Circular 1950, effective May 1, 1956, as amended by Circular 1962, effective October 4, 1956 (copies attached, together with explanatory Information Sheet).

Edward Woozley
Director

Attachments 3

(Distribution on Page 3)

* A $5.00 filing fee is required for each mining claim included in an appeal.

1y

DISTRIBUTION:

Mrs. Gussie A. Stewart, Attorney for Sandy Scott Caples (Registered Mail)
Sandy Scott Caples (Regular Mail)
Mr. Jesse E. Farr, Attorney in Charge, Office of General Counsel, Forest
  Service, San Francisco, California
Hon. Clair Engle
Hon. Thomas H. Kuchel
Hon. Alan Bible
Hon. Wm. F. Knowland
Appeals List No. 1
Mr. John Sieker, Agriculture Department (8)
FAP

In reply refer to:

Contest No. 5168
Sacramento Misc. 68381

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 15, 1957

Certified Mail
Return Receipt Requested

DECISION

United States, :
Contestant :
:
v. :
:
Keith V. O'Leary and :
Donald K. Moore, :
Contestees :

Involving the Kay placer
mining claim, located
June 13, 1950, in the
N½SW¼SW¼, N½S½SW¼SW¼
sec. 4, T. 8 N., R. 13 E.,
M. D. M., California

Appeal Dismissed

There was received in this Office on July 24, 1957, from Hearing Examiner John A. Wood, Post Office Box 4231, Sacramento 21, California, a notice of appeal submitted to him on July 16, 1957, by Charles L. Gilmore, Attorney at Law, of the firm of Gilmore & Gilmore, agents for contestees Keith V. O'Leary and Donald K. Moore, from a ruling of Examiner Wood, the presiding examiner at the hearing in the above-identified Government contest on June 19, 1957. The ruling in issue denied a motion to dismiss and overruled a demurrer to the proceedings, which had been presented by the contestees (appellants), and ordered the hearing to proceed. The principal basis for the appeal appears to be a challenge to jurisdiction in the proceeding, it being contended that the decision dated September 28, 1956, of the Secretary of the Interior, in the matter of United States v. Keith V. O'Leary et al. (63 I.D. 341) had been ignored. The appeal recites also that the presiding examiner refused to furnish a copy of his ruling on the motion to dismiss and demurrer, stating it was not an appealable matter. It is stated further in the notice of appeal that the appellants propose to submit a written argument or brief in support of the appeal.

The motion to dismiss and demurrer to the proceedings had been filed with the examiner on June 3, 1957, [1] one day before the date set for the rehearing in the matter of the validity of the claim involved in the contest proceeding, pursuant to the decision referred to above of the Secretary of the Interior. This decision had remanded the contested matter for rehearing in conformity with the requirements of the Administrative Procedure Act of June 11, 1946 (5 U.S.C., 1952 ed., sec. 1001 et seq.) and the provisions of the Department's revised rules of practice (43 CFR Part 221; 21 F. R. 1860). [2] It is asserted in the motion to dismiss and demurrer, in substance, that the Department is without jurisdiction under the form of contest involved to proceed with the hearing and further that neither the requirements of the Administrative Procedure Act nor the rulings of the Secretary of the Interior in his decision of September 28, 1956, supra, have been complied with in the proceeding which was scheduled in the matter by the examiner.

From the record assembled it appears that the contestees were represented at the hearing which had been scheduled for June 4, 1957, by their counsel, Charles L. Gilmore, and that Joseph E. Taylor, Assistant Regional Solicitor, Box 4291 T. and C., Sacramento 21, California, represented the contestant. Comments upon the motion of the contestees were offered by the attorney for the contestant. The presiding examiner thereupon continued the hearing to June 19, 1957, a date agreed upon by the parties, and he announced he would reserve his decision on the motion until that date. He cautioned both parties to be prepared to proceed with the hearing at that time and to present evidence on the merits of the case. On June 14, 1957, the contestees filed with the examiner a response to the comments of the contestant's attorney relative to the motion to dismiss and demurrer, which document is denoted "Reply to Solicitor's Objections." Copy thereof appears to have been served upon the counsel for the contestant by certified mail on the same date.

At the commencement of the continued hearing on June 19, 1957, at which there appeared the same parties who were present at the previous hearing before the examiner on June 4, 1957, the examiner announced he had considered the motion, the arguments in support thereof, and the arguments in opposition thereto, giving his judgment thereon, and he ruled that the proceeding was in conformity with the Administrative Procedure Act and the Departmental rules of practice. Accordingly, he denied the motion to dismiss, overruled the demurrer, and ordered the hearing to continue. The attorney for the contestees then stated the contestees wished to stand upon their demurrer and motion to dismiss and to await a ruling on appeal from this ruling of the presiding examiner. The record shows the examiner advised the attorney for the contestees that his ruling was interlocutory only and not an appealable matter, and he invited attention to the ruling of the Secretary of the Interior in a similar situation which had occurred in United States v. Al Sarena Mines, Inc. (61 I.D. 286.) Thereupon the attorney for the contestees left the hearing room, and the examiner called upon the attorney for the contestant to present his case, which he did.

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[1] Copy thereof was furnished the attorney for the contestant on the same date by the contestees.

[2] Effective May 1, 1956, and further amended effective October 4, 1956 (21 F. R. 7022).

To date a decision on the contest hearing has not been rendered by the presiding examiner.

In the Al Sarena case, cited above, which also involved a Government mineral contest, the Department considered a contention of the contestees that the Federal Rules of Civil Procedure were applicable to the hearing there involved and that under those rules evidence on the merits of a case could not be received during the pendency of an appeal from a ruling on a demurrer filed in the proceeding. The Department held that the Federal Rules of Civil Procedure were not applicable to the hearing, and the rules of practice of the Department do not provide for any such procedure. The Department stated, "The purpose of the hearing under the Department's Rules of Practice is to give both parties full opportunity to present their evidence and if a claimant chooses to withdraw from the hearing without submitting his evidence or subjecting the Government witnesses to cross-examination, he must bear the consequences." The Department stated further that, "The appellant, having had full opportunity to participate in the hearing, chose to withdraw therefrom without submitting its evidence. The Manager was, in such circumstances, fully justified in permitting the contestee to submit its evidence against the validity of the claims, and thereafter to base his decision on the testimony adduced at the hearing."

The action of the examiner in proceeding with the hearing as he did is consistent with the ruling of the Department in the case referred to above. In administrative hearings of the type here involved it is considered that rulings of the examiner in the proceeding are interlocutory in nature and the taking of an appeal therefrom prior to the rendering of a decision by the hearing examiner, in accordance with the record assembled, is premature. The Departmental rules of practice (43 CFR Part 221; Circular 1950, effective May 1, 1956, and Circular 1962, effective October 4, 1956), do not provide for appeals from rulings of a hearing examiner in the conduct of a hearing, preliminary to the rendering of his decision in the matter. They provide for written decisions in hearings cases by the examiner (221.76) and that parties adversely affected by such decisions may appeal to the Director as provided in Subpart A of Part 221, CFR (221.77). The regulations specify that the initial decision as a result of a hearing shall be made by the hearing examiner and shall be served upon all parties to the case (221.76b), unless the Director has required the examiner to make only a recommended decision in the matter (221.76c). A recommended decision was not required in the subject case.

The appeal is therefore dismissed as premature, and the record will be returned to the hearing examiner for his decision in the matter of the contest proceeding. The dismissal of the purported appeal is without prejudice to the right of the contestees to exhaust their administrative remedies as to the points raised in the motion to dismiss and demurrer or as to any other matters properly involved in the contest proceeding in any proper and timely appeal which they may take from the decision which is rendered by the examiner in this case.

(Sgd.) Edward Woozley
Edward Woozley
Director

Approved: August 15, 1957
(sgd.) Roger Ernst
Roger Ernst

Asst. Secretary of the Interior

DISTRIBUTION:

Charles L. Gilmore, for Contestees (Certified Mail)
Joseph E. Taylor, for Contestant (Certified Mail)
Each Contestee (Regular Mail)
Hearing Examiner J. A. Wood
Hearings Administrative Officer E. F. Graham
Appeals List No. 1
FAP

In reply refer to:

Contest No. 6-717
(Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 21, 1957

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant)
:
(
vs. : Lode Mining Claim
)
Grace E. Hutchins, Contestee :
Appellant (
:

Decision of the Manager Affirmed

Mrs. Hutchins appealed to the Director of the Bureau of Land Management from a decision of the Manager of the Land Office at Los Angeles, California, dated November 24, 1954, which declared null and void the Sweepstake, Copperfield, Copperfield No. 2, Dixie No. 1, and Dixie No. 1 Extension lode mining claims, on findings that the Government had sustained its charges that there had not been a valid discovery of mineral on any of the claims, and the lands involved are essentially non-mineral in character.

The decision was based on a contest hearing held before the Manager on April 21, 1953, at which Mr. E. Rowland Tragitt, and Mr. Val Payne, both qualified mining engineers employed by the Bureau of Land Management, testified for the Government. Mrs. Hutchins did not appear at the hearing, nor were there witnesses in her behalf. However, pursuant to a signed stipulation of the parties a deposition of her testimony was taken at Salt Lake City, Utah, on August 30, 1954.

The claims are located in sections 4, 5, and 6, T. 30 S., R. 45 E., M.D.M., California. They are within the Mojave Naval Aerial Gunnery Range. The claims were located on the following dates: Sweepstake, November 21, 1937; Copperfield, November 12, 1939; Copperfield No. 2, August 9, 1941; Dixie No. 1, March 15, 1940; Dixie No. 1 Extension, January 23, 1941. (Tr. p. 7-8).

The Manager found on the basis of the testimony offered that the mineralization in the claims is extremely spotty, with the best indication of copper on the surface and the showing dissipating with depth. He found that two shipments of ore did not pay the freight to the smelter, and that it is not practical or feasible to make a reduction of the ore on the claims. He stated that the assay reports submitted by the claimant were not representative samples, but were samples of the highest grade ore which the claimant could find. The Manager concluded that there had been no valid discovery of mineral on the claims, and that the lands are essentially non-mineral in character.

On December 30, 1954, Mrs. Hutchins filed an appeal. She stated that "My appeal is based upon error of law and fact occurring in connection with said decision." She did not specify wherein the decision of the Manager was in error.

On January 4, 1955, the Acting Manager wrote Mrs. Hutchins explaining that under the rules of practice an appeal to the Director must specify the grounds of the appeal, and if based on a claimed insufficiency of the evidence the particulars of the claimed insufficiency must be specifically set forth. He enclosed a copy of the rules of practice, 43 CFR Part 221 (1954), calling attention to sections 221.47 to 221.52, and stated that on failure to comply with the rules of practice the case would be closed.

The regulations then in effect provided, 43 CFR 221.50(a), as follows:

> "Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal, in the form of specifications of error, which shall be separately stated and numbered; where error is based upon insufficiency of the evidence to justify the decision, in the assignment thereof the particulars wherein it is deemed insufficient must be specifically set forth in the notice. All grounds of error not assigned or noticed and argued in the brief will be considered as waived."

Mrs. Hutchins did not respond to the Acting Manager's letter, and it is evident that her appeal did not conform with the requirements of the quoted regulation. More than two years after the allowed time for filing an appeal brief had expired, she wrote a letter of inquiry about her appeal. She therein reiterated certain testimony in her deposition, stating that "I worked a rich lenz on a vein all during the depression. I worked with hand steel and I blasted and mucked and sacked high grade ore which I sold for 50¢ a 100 lbs, the ore went 25.47% copper, $5.80 a ton Gold and 2 ounces silver to the ton." She also stated that the Government witnesses had taken their samples from the dumps and not from the veins, and that if the ore had been any good it would not have been on the dump.

Despite the inadequacies of the appeal, a careful review has been made of the law and precedents relied on by the Manager, and of the hearing record.

I.

Appellant stated generally that her appeal is based on "error of law" in the Manager's decision. Under the mining laws "*** no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Rev. Stat. § 2320, 30 U.S.C. 23 (1952). The Manager cited Departmental decision, United States v. Anthony F. Mott, A-26196 (September 13, 1951) as to the test in determining whether a valuable mineral deposit has been discovered. That test is well settled, and is the same applied in the leading decision of Castle v. Womble, 19 L.D. 455 (1894), that

> " *** where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

This test received the approval of the Supreme Court. Chrisman v. Miller, 197 U. S. 313, 322 (1905); Cameron v. United States, 252 U. S. 450, 459 (1912).

The discovery requirement was analyzed in Jefferson-Montana Copper Mines Co., 41 L.D. 320, 323 (1912) as embracing the following elements:

> "1. There must be a vein or lode of quartz or other rock in place;
> 2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
> 3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine."

In United States v. Wilmot D. Everett, A-27010 (Supp.) (October 17, 1955) it was held that the detection of the presence of minerals in samples taken from veins or stringers does not of itself constitute a valid discovery under the mining laws. To satisfy the law the discovery must be more than the showing of only isolated bits of mineral not connected with or leading to substantial values. United States v. Frank J. Miller, 59 I.D. 446 (1947). If a mining claim has been worked out it is not subject to disposition under the mining laws, United States v. Margherita Logomarcini, 60 I.D. 371 (1949), or if the discovery is lost before patent and no new discovery is made the claim becomes invalid, Star Gold Mining Co., 47 L.D. 38 (1919).

II.

The record shows that each of these claims are old and have been located and relocated many times since Copper City flourished prior to 1900. (Tr. p. 29). As early as 1902 the State of California had reported this area as idle as far as copper production is concerned. (Tr. p. 29). Most of the improvements were made years before the present location. (Tr. pp. 10, 18, 40).

Two shipments of ore were shown by settlement sheets, one showing an assay of 7.71% copper (Plaintiff's Exhibit No. 6; Exhibit C) and the other 2.9% copper (Plaintiff's Exhibit No. 7; Exhibit E). Both shipments were financially unsuccessful as the return did not pay for the cost of shipment. (Dep. p. 11). It was not disputed that there is not sufficient water available to mill the ore before shipment (Tr. pp.28-29), and that with low grade ore a very extensive showing must be present in order to prove profitable (Tr. p. 28). Tragitt estimated that about 5 tons of ore of the approximate value of that shown in Plaintiff's Exhibit No. 7, is present in small piles of selected ore at various improvements. He could find no ore on the dumps or sorted elsewhere of the value of the shipment shown in Plaintiff's Exhibit No. 6. He was of the opinion that the claimant had sorted and shipped all the richest ore in the shipment shown in Plaintiff's Exhibit No. 6. (Tr. p. 27).

Mrs. Hutchins complained in her letter of April 17, 1957, that samples taken by the Government were from the dumps. Mr. Payne's samples were each taken from rock in place which showed the best mineralization he could find. With one exception the copper values on Payne's samples were lower for each claim than those of the samples taken by Tragitt from the best sorted ore from the dumps. The exception was on the Dixie No. 1 claim where Payne's sample showed 1.95% copper and Tragitt's 1.7% copper. (Tr. pp. 19, 40).

Tragitt testified that average values from his samples on the Sweepstake, Copperfield, and Copperfield No. 2 were $.89 gold per ton and 3.46% copper. Average values as to the Dixie samples were $.70 gold per ton and 2.7% copper (Tr. p. 26). In each case his samples were not representative, but were from the highest grade ore he could find. He further testified, (Tr. p. 25):

> "My opinion is that the ore is not in sufficient quantity, or of sufficient quality to justify any further expenditure of time and money with a reasonable hope of developing a paying mine. These two smelter settlement sheets show that by sorting out ore on the dump that was already on top of the ground, where there was no mining costs or equipment costs in there, that it wouldn't pay, picking out the very best chunks of ore that was mined by someone else; it wouldn't even pay to haul them to the smelter, and if the very best pieces wouldn't pay, no prudent man would attempt to mine other ore."

Payne did not figure an average value because "The grade was so low, it wasn't worth considering. The grade runs from .40 to 1.95 per cent, or all less than 2 per cent copper, and gold values, of course, were practically negligible." (Tr. p. 42). He further stated, (Tr. p. 43):

> "No reasonably prudent man, having any hopes of making a paying mine out of anything so extremely spotty, and with such practically negligible values, either for the copper or gold, and so far as any possibility of consideration of working it for copper, there is insufficient quantities of such grade, and the cost of mining would far exceed any hopes of mining it. The cost of shipping to a smelter would be greater than the values contained, according to the samples taken."

Mrs. Hutchins testified that she had operated the claims from 1931 to 1943, and had mined and taken ore from all the claims and sold it for 50 cents a gunny sack for 2½ years prior to 1940 (Dep. pp. 2-3). Yet none of the claims were located by her until after 1937, and three of the five claims were located in 1940 or later. Mrs. Hutchins testified that during the 2½ years mentioned she had eked out an existence from the claims. (Dep. p. 3). The only proof of ore shipments were of two shipments in 1942, with the settlement sheets referred to previously, showing that the money received did not pay the cost of shipment.

III.

In view of the law stated previously, the testimony summarized above gives strong support to the Manager's finding of no valid discovery. In addition, a careful analysis has been made as to the specific testimony directed to the individual claims.

SWEEPSTAKE

The Government witnesses Tragitt (Tr. p. 10), and Payne (Tr.p.40) both testified that the several workings on the claim were very old--they were made years before this location-- and are sloughed or partially caved in. The improvements include several trenches and small pits, and two small inclines. Payne took a sample from high grade spots on the structure exposed on Improvement No. 4 (Tr. pp. 39-40), which assayed $.70 gold per ton and 1.20% copper. (Plaintiff's Exhibit No. 8). Tragitt took a sample from the best mineralized rock in the dump near that improvement (Tr. p. 14), which assayed $1.40 gold per ton and 6.1% copper. (Plaintiff's Exhibit No. 5). Tragitt testified that the best copper showings were on the surface, and that the showing dissipates at depth (Tr. p. 29). Tragitt took two more samples from the best mineralized rock on dumps (Tr. pp.15-16), one of which assayed at $.88 gold per ton and 2.6% copper, and the other $1.05 gold per ton and 2.8% copper. (Plaintiff's Exhibit No. 5).

Mrs. Hutchins submitted an assay certificate, dated June 14, 1950, which she testified was of a sample taken from the highest grade ore she "could find to prove that there was mineral there," (Dep. p. 5) and which assayed at 10.6% copper (Exhibit A). She could not identify the place of sampling from a map, but said it was from one of 5 veins on the claim (Dep. p. 13). She testified (Dep. pp. 2-3) of having sold some ore from the claim for $.50 a gunny sack.

The Government testimony as to the claim clearly sustains the burden of showing no valid discovery. The unsupported testimony by the claimant as to ore shipments and the assay report admittedly of a sample taken from the best ore obtainable does not overcome the Government showing. As pointed out above, more is required to show a discovery than the showing of isolated bits of mineral. That the rock in place assayed considerably lower than that in the dump strongly supports Tragitt's conclusions that the best ore is in the dump and that the showing dissipates at depth. The evidence amply supports the finding of no valid discovery.

COPPERFIELD

The improvements, also very old (Tr. pp. 10,40), consist of two inclines. One is 5 x 6 x 19 feet which exposes a 1/2 to 1 foot copper stained quartz vein (Tr. p. 11). Tragitt took a sample from the best mineralized rock in the dump near the improvements (Tr. p. 11), which assayed $.88 gold per ton and 3% copper (Plaintiff's Exhibit No. 5). Payne sampled the best mineralized rock in place from 12 and 18 feet depths of the shaft which assayed $.70 gold per ton and .95% copper. (Plaintiff's Exhibit No. 8). Tragitt took a sample from the best mineralized rock on the dump near a 5 x 15 feet incline (Tr. p. 13), which assayed $.70 gold per ton and 2.8% copper (Plaintiff's Exhibit No. 5).

Mrs. Hutchins offered no testimony as to this claim, except to concede that it is the Juanita Mine mentioned in a 1902 California State Mining Bureau Bulletin (Dep. p. 9).

The Government maintained the burden of showing no valid discovery as to this claim, and there was no rebuttal by the mining claimant.

COPPERFIELD NO. 2.

Payne located the limits of this claim with the help of a Lester Martin (Tr. pp. 34-35). The one improvement designated "Improvement No. 2", likewise old (Tr. pp. 10,40), consists of a small pit or shaft about 8 x 10 x 8 feet (Tr. p. 34). Tragitt chipped a sample across 3.5 feet of the fractured zone containing the best mineralization (Tr. p. 13). The sample assayed $.35 gold per ton and .5% copper (Plaintiff's Exhibit No. 5).

Payne likewise took a sample from the pit (Tr. p. 38), which assayed $.35 gold per ton and .40% copper (Plaintiff's Exhibit No. 8). Payne testified that he normally looks for representative samples, but here he looked for the very best. He said there may be a spot of 4 or 5 feet of copper staining, then a completely bare area for 20 or 30 feet. (Tr. p. 39).

The clear evidence of no valid discovery went unchallenged by any specific testimony of the mining claimant.

DIXIE NO. 1.

The claim has a single improvement consisting of a 6 x 6 feet incline running for 40 feet, on a 1 to 2 foot quartz vein. (Tr. p. 19). Tragitt testified that the hanging wall and footwall show copper staining for one foot, and that the maximum width of the mineralized zone is 3.2 feet. (Tr. p. 19). There is a trench at the collar of the incline 4 x 6 x 8 feet. Mrs. Hutchins testified of uncovering a hundred feet vein in 1939, that was a foot wide at the surface and widened out as it went deeper-- 4 feet wide at 40 feet down (Dep. pp. 3-4). She admitted that one shaft was old. Tragitt took a sample from the best sorted ore on the dump (Tr. p. 19), which assayed $.70 gold and $.06 silver per ton and 1.7% copper. (Plaintiff's Exhibit No. 5). Payne took a sample from the improvement (Tr. pp. 40-41), which assayed $1.65 gold per ton and 1.95% copper (Plaintiff(s Exhibit No. 8).

Mrs. Hutchins testified that a lense from the claim went 25.47% copper and $5.80 gold, but she produced no assay report to support the testimony, and the Government objected to the testimony. (Dep. p. 4). She submitted an assay report dated June 14, 1950 (Exhibit A) showing 14% copper from the highest grade ore she could find on the claim. (Dep. pp. 4-5). A settlement sheet dated September 8, 1942, from a carload of ore stripped from the top of the claim was submitted (Exhibit E; Plaintiff's Exhibit No. 7). The carload consisted of 45104 dry pounds which assayed 2.9% copper and .035 ounces of gold per ton. This returned $1.25 per ton after milling deductions, or $28.19 total. Freight alone cost $139.80.

The claimed assay of 25.47% was a mere unsupported assertion by the claimant, and the claim does not now show any such values. The assay report showing 14% copper was admittedly from the highest grade ore which could be found on the claim; while it shows the presence of some minerals it does not overcome the positive showing of no valid discovery. The ore shipment was singularly unprofitable and the present values do not even measure up to the assay on that shipment.

DIXIE NO. 1 EXTENSION.

With the exception of two small pits the improvements are old-- made before present location in 1941-- and, according to Tragitt (Tr. p. 18) are sloughed and overgrown with weeds and shrubs. One improvement is a 4 x 6 feet incline running 115 feet. Seventy-five feet below the collar of the incline a 35 foot vertical shaft runs, with a quartz vein varying from .8 to 2.5 feet in width and with iron staining and slight copper staining. Tragitt took a sample from the sorted ore on the dump (Tr. p. 17) which assayed $.35 gold and $.05 silver per ton, and 2% copper. (Plaintiff's Exhibit No. 5). Payne took two samples from rock in place in the incline shaft (Tr. p. 41) which assayed $.70 gold per ton and 1.25% copper, and $.70 gold per ton and .46% copper. The second improvement is a 4 x 6 feet incline 12 feet long, with a quartz vein .9 to 1.8 feet in width (Tr. p. 18). Payne took a sample from rock in place (Tr. p. 40) which assayed $1.40 gold per ton and 1.10% copper (Plaintiff's Exhibit No. 8). The third improvement is a 30 feet cut bearing to the portal of a 4 x 5½ feet tunnel which bears 25 feet to the same vein as in the second improvement, and 22 feet from the portal a drift on the vein bears south to the face, with width of the vein from 1.1 to 2.5 feet (Tr. p. 18). Tragitt sampled sorted quartz on the dump (Tr. pp. 18-19) which assayed $1.05 gold and $.11 silver per ton, and 3.1% copper (Plaintiff's Exhibit No. 5). Payne sampled copper stain on the vein (Tr. p. 41) that assayed $1.40 gold per ton and 1.28% copper.

A settlement sheet dated March 12, 1942, was introduced for a shipment of 6,396 pounds of ore to Salt Lake City (Exhibit C; Plaintiff's Exhibit No. 6). The shipment assayed .075 ounces gold per ton, and 7.71% copper, and returned $32.90 after smeltering charges. Mrs. Hutchins admitted (Dep. p. 11) that this did not pay for trucking the ore to the smelter, and that the ore had come from the lense (Dep. p. 12). Mrs. Hutchins' Exhibit G was a letter from the smelter referring to the shipment which urged that in the interest of the war effort that the claimant endeavor to speed up production.

The testimony shows the rich ore had already been shipped, and even then the shipment did not pay for transportation to the smelter. The claimant had no testimony other than the shipment over 10 years previously to show a valid discovery on the claim. The evidence sustains the finding of no valid discovery.

IV.

In view of the above it is concluded that the Government has sustained the burden of showing that there is not a valid discovery of mineral on any of the claims in issue. That charge being clearly sustained, consideration of the second charge, namely, that the land is essentially non-mineral in character, is not required.

Accordingly, the decision of the Manager is affirmed. The claims are hereby declared null and void.

The right of appeal to the Secretary of the Interior is allowed. If such appeal is taken, it must be received in this Office within 30 days from notice hereof and must be accompanied by a $5.00 filing fee for each mining claim involved in the appeal. Strict compliance must be made with 43 CFR Sections 221.31 to 221.35, inclusive, and other pertinent sections of the rules of practice, Circular 1950 effective May 1, 1956, as amended by Circular 1962, effective October 4, 1956. See Information Sheet attached.

(Sgd) Earl J. Thomas

Acting Director

Attachment

DISTRIBUTION:
Mrs. Grace Hutchins (Certified Mail)
Hon. Gordon Allott, United States Senate
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, Forest Service, U. S. Department of Agriculture (8)
Appeals List No. 1
GST

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

5.05d-1A

September 10, 1957

DECISION

Philip W. Wasmuth and	:	Mineral Patent 3115. Humboldt
R. Wasmuth, Patentees	:	Mineral Entry No. 26, Mineral
	:	Survey lot No. 38.

New and Correct Patent to Issue

The application by E. J. Anderson of Orleans, California, which was filed on May 21, 1956, also the evidence which was filed on the same day and on May 6, 1957, and certain information which was furnished on May 10 and September 4, 1957, met the requirements for amendment of the numbers and directions of the township and range and the name of the meridian in the Register's final certificate of June 20, 1876, of Humboldt mineral entry 26, and the issuance of a new and correct patent in lieu of mineral patent No. 3115.

Mineral patent 3115 of March 24, 1879 (recorded volume 38, pages 386 to 391) is erroneous because it describes lot 38 as embracing a portion of T. 43 N., R. 15 W., M. D. M., California, and the numbered township and range for that meridian does not exist. The mineral patent was issued before the township survey. According to the official Government plats for T. 11 N., R. 6 E., Humboldt Meridian, California, they designate the mineral lot 38 as embracing a portion of sec. 31 of that township. The field notes and plat of survey for lot 38 were approved on January 12, 1875. They are on file in the mineral entry. They do not show a township and range because the township survey was made later.

The original patent cannot be returned because its whereabouts is unknown. The title report of October 29, 1953, by the Humboldt Land Title Company shows that a portion of lot 38 was owned by E. J. Anderson. The application for amendment and the letter of May 3, 1957, from the Division of Forestry and Lands of the office of the General Counsel of the Department of Agriculture shows that the Forest Service is in the process of purchasing from Mr. Anderson a part of the land for an administrative site. The title opinion mentioned above was made subject to the amendment by this Bureau of the patent because of the " . . . defective description . . . ."

The description of lot 38 in its field notes and plat is not being changed or amended. The change in the new and correct patent will be the designation of another township, range and meridian only for identification purposes. This does not change the description of lot 38 as surveyed and monumented on the ground. Accordingly, there is no new description of lot 38. The issuance of a new and correct patent in the names of the original patentees is proper.

The title opinion cited above also discloses that lot 38 is in Humboldt County, California.

The Register's final certificate of June 20, 1876, of Humboldt mineral entry No. 26 is amended to read for mineral claim or lot of land designated as survey No. 38, embracing a portion of sec. 31, T. 11 N., R. 6 E., Humboldt Meridian, California, Orleans Bar Mining District in Humboldt County, containing 28.05 acres. The mineral patent record No. 3115 will be canceled. A new and correct patent, containing a clause showing the reason why it is issued will be issued in the names of Philip W. Wasmuth and R. Wasmuth in accordance with the amended final certificate.

The new patent will be issued within the next two weeks. The patent will be sent to the State Supervisor of this Bureau at Sacramento for notation on the Land Office records and delivery to the Humboldt Land Title Company, P. O. Box 102, Eureka, California. A copy of the patent will also be sent to the Forest Service, Department of Agriculture, Washington 25, D. C.

For the Director:

W O Hancock

Copy to: Forest Service, Department of
Agriculture, Washington, D. C.
(Attn: Mr. MacFate-Land Adjustment
(4 copies)).

Office of the General Counsel, Department of Agriculture
216 Federal Office Building, San Francisco, California
(Attn: Mr. Farr - Miss Waters.)
Mr. E. J. Anderson, Orleans, California
→State Supervisor, Sacramento, California

Humboldt Land Title Company
P. O. Box 102, Eureka, California

DEPT. OF THE INTERIOR
RECEIVED
SEP 16 1957
BUREAU OF LAND MANAGEMENT
STATE OFFICE
SACRAMENTO 14, CALIFORNIA

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 13, [illegible]

DECISION

Philip W. Wasmuth and
R. Wasmuth, Patentees
:
:
:
Mineral Patent 3115. Humboldt
Mineral Entry No. 26, Mineral
Survey lot No. 37.

Decision of September 10, 1957, Amended

After the decision of September 10, 1957, was rendered and upon drafting the new and correct patent it was ascertained that lot No. 38 was written into the mineral patent record 3115 of March 24, 1879, for entry No. 26, while the mineral plat of survey as represented in the same patent designated the lot number as 37. Lot 38 was also written into the Register's mineral final certificate of June 20, 1876.

Mineral lot 37 is the lot designation for the Wasmuth and Company placer mine on the governing mineral plat of survey, which was approved on January 12, 1875, for Humboldt mineral entry 26. Its patent is numbered 3115 of March 24, 1879.

There is filed in the mineral case file for entry 26 and patent 3115 a letter of August 17, 1878, from the then Surveyor General for California to the Commissioner of the General Land Office. The letter reads in part as follows:

> " . . . the mineral monument established at junction of Wilder Creek with Klamath River. It also shows that this mineral monument is a corner of the Wasmuth & Co. Placer Mine, and that this mine is designated as lot No. 37 in reference to said monument."

The decision of September 10, 1957, cited above, is amended in all places where it reads for lot 38 so as to read for lot 37. This will not change the metes and bounds description of the Wasmuth and Company placer mine as surveyed and monumented on the ground according to the field notes and the governing mineral plat of survey. Copies of the field notes and the mineral plat will become a part of the new and correct patent. Such plat will show lot 37.

The decision of September 10, 1957, is not changed in any other respect.

In order to explain the patenting of mineral lot 38 the following information is given:

Mineral lot No. 38 in the Orleans Bar Mining District in Humboldt County, California, containing 136.01 acres, was patented to Joseph Goode, Charles Dowds, John Line, Edwin Benjamin and James W. Graham on November 30, 1880, under Humboldt mineral entry No. 25. Its mineral patent is numbered 4363. The patent is recorded in volume 54 on pages 348 to 354 inclusive. The governing plat of survey for Humboldt mineral entry 25 and its patent 4363 is the mineral plat of January 12, 1875, amended June 1, 1880. This plat designates the Goode and Company placer mine as lot 38.

Inspection of the plat of survey of T. 11 N., R. 6 E., Humboldt Meridian, California, discloses errors in the designation of mineral claims in sec. 31. The plat of that township approved May 2, 1883, incorrectly represents the Goode and Company placer mine as lot 37, and the Wasmuth and Company placer mine as lot 38, whereas the approved mineral surveys of these placer mines which are controlling, designate these mines as lots 38 and 37, respectively. Similar errors were made in the supplemental plats of this township approved February 24, 1911, May 13, 1915, November 17, 1915 and June 14, 1917. These errors in designation on the township plats are recognized, but will not be corrected at this late date.

For the Director:

WOHancock

Copy to: Forest Service, Department of
Agriculture, Washington 25, D. C.
(Attn: Mr. MacFate-Land Adjustment
(4 copies)).
Office of the General Counsel, Department of Agriculture
216 Federal Office Building, San Francisco, California.
(Attn: Mr. Farr - Miss Waters).
Mr. E. J. Anderson, Orleans, California.
State Supervisor, Sacramento, California.
Humboldt Land Title Company
P. O. Box 102, Eureka, California.
Cadastral Engineering, Staff Officer
(Attn: Mr. Clement).

In re refer to:

Los Angeles 0104433
0104434
0107853
0127124
0132957
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 13, 1957

Certified Mail
Return Receipt Requested

DECISION

Edwin M. Scott, Jr.	:	
P. R. McClung	:	Sodium Prospecting Permit
William E. Ingall		Applications
David R. Denny	:	

Manager's Decision Affirmed

Edwin M. Scott, Jr., and three others 1/ have appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Los Angeles, California, dated August 26, 1955, rejecting their respective applications for sodium prospecting permits, filed under the provisions of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., secs. 261-263) for certain lands in the vicinity of Searles Lake, California. The applications were each rejected, in whole or in part, because the lands sought had been classified as valuable for sodium and therefore were subject only to the sodium leasing provisions of the Mineral Leasing Act. Four of the applications were in part rejected because of conflict with certain entries patented without a reservation of the mineral deposits to the United States and prior issued sodium permits and potassium lease.

The appellants do not contest the correctness of the Manager's decision insofar as it rejected their applications because of conflict with prior patents, permits or lease. They each severally contend that the other lands applied for have been erroneously classified. Although the appeals differ somewhat, one from the other, each is basic in contending that the lands should be classified to allow prospecting in order to

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1/ Edwin M. Scott, Jr., Los Angeles 0104433, 0104434; P. R. McClung, Los Angeles 0107853; William E. Ingall, Los Angeles 0127124; David R. Denny, Los Angeles 0132957.

discover whether in fact there are commercially valuable sodium deposits thereon. They each contend that the classification that there are known commercially valuable deposits within the rejected lands is incorrect. The appellants point out that the classification was made by the Geological Survey several years ago and that the sodium deposits in the lands, set up into leasing units, by the Geological Survey and the Bureau, may now be depleted because of the activities of sodium lessees on contiguous or nearby lands. The appellants contend, in substance, that the rejected lands are not known to contain valuable sodium deposits and request further opportunity to present and examine evidence bearing upon the proper classification of the lands under application and to present written and oral argument thereon.

The sodium prospecting permit applications of the appellants, with the exception of the Denny application, were each filed in 1953. During the time that their applications were pending, the Department considered the protests of Frank M. Darrow and Howard W. Dougherty to the classification of the identical lands involved in this appeal, as known sodium lands, subject to leasing. In its decision of April 15, 1955 (A-27053, A-27057), the Department held that in the absence of proof to the contrary the finding of the Geological Survey was binding upon the Bureau of Land Management, and that the classification of the lands as known sodium lands will not be disturbed. The same conditions, as are involved in this appeal, prevailed in the Darrow case. The appellants, during the pendency of their appeals, submitted no additional evidence. The factual data concerning the Searles Lake sodium deposits on file with the Bureau is sufficient to properly determine the issues involved. In such case, it is proper to deny a request for a hearing under 43 CFR 221.6.

The appellants have submitted no evidence to controvert the classification of the lands as known sodium lands. The testimony submitted on appeal is a duplication of and cumulative to the evidence previously considered by the Bureau, both in the cases here involved and in the Darrow case, supra. Inasmuch as the leasing of lands known to contain valuable deposits of sodium by competitive bidding is mandatory if the lands are to be leased at all (30 U.S.C., sec. 262), a prospecting permit for lands known to contain commercially valuable deposits may not be issued under 30 U.S.C., sec. 261. Burnham Chemical Co. v. Krug, 81 F. Supp., 911, 181 F. 2nd 288, 340 U. S. 826.

Therefore, the Manager's decision, rejecting each of the appellant's sodium prospecting permit applications is affirmed.

The Manager is directed to proceed with the sale by public auction.

(Sgd.) Earl J. Thomas

Earl J Thomas

Acting Director

Approved: September 26, 1957

Asst. Secretary of the Interior

DISTRIBUTION:

Messrs. Chapman and Wolfsohn, Attorneys at Law (Certified Mail)
Mr. David R. Denny (Certified Mail)
Mr. Edwin M. Scott, Jr. (Regular Mail)
Mr. P. R. McClung (Regular Mail)
Mr. William E. Ingall (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (15)
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Appeals List No. 1
BF

24844

appeal to Sec affirmed — A-27578 - 7/28/58
affirmed & remanded A-27588 7/14/58

In reply refer to:
Contest No. 6755
Los Angeles 056758
037880-B
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 13, 1957

Certified Mail
Return Receipt Requested

DECISION

Union Oil Co. of California, Contestant
v.
Western Drilling & Producing Co., et al: Contestees
and
United States, Intervener

Mining Claim-Oil Placer

Manager's Decision Affirmed

On May 14, 1951, the Union Oil Company of California filed a protest in the Land Office, Los Angeles, California, against noncompetitive oil and gas lease Los Angeles 056758, issued effective from February 1, 1948, to the extent that it embraced the east portion of Lot 3, Sec. 33, T. 5 N., R. 19 W., S.B.M., California, asserting that at the time of leasing said lands were covered by a valid and existing placer mining claim known as the Udall Oil Placer Mining Claim, and was, therefore, not subject to leasing under the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1952 ed., sec. 181 et seq.).

The protest further disclosed that by a deed dated June 5, 1895, the Union Oil Company of California acquired the interest of Richard Gird and James C. Udall in the Udall Oil Placer Mining Claim. Since 1910 the claim has been leased and through assignments is now and has been for many years under private lease to the Turner Oil Company; that in 1911 oil was discovered on the claim; that continuously since then drilling and producing operations have been conducted on the claim; that the Assistant Director, Bureau of Land Management, issued a decision dated November 4, 1948, based upon a field investigation and report with reference to Lot 2, Sec. 33, T. 5 N., R. 19 W., S.B.M., California, which held the Udall Oil Placer Mining Claim to be existent and valid and covers the tract in question which is not subject to leasing under the Mineral Leasing Act of February 25, 1920, supra; and that lease Los Angeles 056758 be investigated to the extent of its conflict with the Udall Oil Placer Mining Claim.

The protest was treated as an application to contest and as such was served on the leaseholder of oil and gas lease Los Angeles 056758.

Answers and objections to the petition were filed by the contestees denying the allegations, and made affirmative answers, stating that as to Lot 3, Sec. 33, T. 5 N., R. 19 W., S.B.M., California, which is included in oil and gas lease 056758, that the stone markers of the Udall Mining Claim were not properly placed on the ground; that according to the Treadwell plat (unofficial Mineral Survey No. 3217) the boundary lines of the lots can be estimated; that according to a Supplemental plat approved January 14, 1935, the western boundary of the Udall Mining Claim is 570 feet east of the north-south section line for sections 32 and 33, and that the northern boundary line of the Udall Mining Claim lies approximately 200 feet south of the section line for sections 33 and 28; that in the east-west direction there is 750 feet in Lot 3, 1320 feet in Lot 2 and 570 feet in Lot 1; that on the ground the Udall Mining Claim is also situated on lands included under oil and gas lease Los Angeles 037880-B, being Lot 1, Sec. 33; that for many years the contestant had full knowledge that lease 037880-B included Lot 1, Sec. 33, which came within the original boundary of the Udall Mining Claim, but at no time asserted any right to it and is estopped to claim any rights in Lots 1 and 3, Sec. 33; and that the contestant has abandoned and waived any and all rights in and to the Udall Mining Claim.

Pursuant to notice a hearing was held before the Manager, Los Angeles Land Office, in the Federal Building, Los Angeles, California, on January 14, 1954. The contestant, the Union Oil Company of California, was represented by W. P. Blair, attorney at law, and A. B. Henderson; the Western Drilling and Producing Company was represented by Mr. Alex. A. Cowie, who also appeared for himself. A. W. Brunton, attorney at law, appeared for himself. (Tr. 1). The United States, which intervened to develop all the facts, was represented by Robt. T. Felton, Assistant Regional Counsel, Bureau of Land Management, and J. H. Favorite, Chief of Minerals, Regional Office, Bureau of Land Management.

Witnesses for the contestant were Miss Margaret McConnell, assistant secretary and bookkeeper for the Turner Oil Company; George Lane, field engineer, Union Oil Company; and John L. Church, Manager of Lands, from 1921 to 1949, for the Union Oil Company.

Witnesses for the contestees were Mrs. Hazel A. Brickham, draftsman, U. S. Geological Survey; J. C. Miller, Regional Geologic Mineral Classification Branch, Conservation Division, U. S. Geological Survey; and Alex. S. Cowie, land surveyor and railroad engineer, appeared as his own witness.

A. C. Kinsley, mining valuation engineer, Bureau of Land Management, appeared as witness for the intervener, the United States.

At the outset of the hearing it was stipulated and agreed between the parties that Lot 1, Sec. 33, included in oil and gas lease Los Angeles 037880-B would also be considered in the contest (Tr. 2, 111).

In a decision dated June 17, 1954, the Manager held (1) the Udall Oil Placer Mining Claim valid, (2) oil and gas leases Los Angeles 056758 and 037880-B are cancelled to the extent of conflict with the Udall Oil Placer Mining Claim, leaving for future determination the actual location on the ground of the Udall Oil Placer Mining Claim. The decision included the right of appeal.

On June 21, 1954, a notice of appeal was filed by the contestees on the grounds (1) that the decision is not supported by the evidence, (2) that the decision is against the law, and (3) that all the issues in the contest were not decided. It is argued, in substance, that title of the Union Oil Company to the Udall Mining Claim was not proved; that the location of the Udall Mining Claim is not established except as shown on contestees' Exhibit F; that the equitable defenses pleaded were not considered; that the decision of the Assistant Director, dated November 4, 1948, as to Lot 2, Sec. 33 being in the Udall Mining Claim is not binding on the contestees, as they had no opportunity to be heard; and that, therefore, the Manager's decision be set aside. The contestees suggested to the Department that the contestant be required to secure a patent for the Udall Mining Claim according to the contestees' suggested description and location of the Udall Mining Claim.

On August 20, 1954, the Union Oil Company, contestant, filed an answer to the appeal, asserting that the decision of the Manager is supported by the evidence, is in accordance with the applicable laws and administrative regulations, and, among other things, the location of the claim is established by the Ventura County, California, records, and physically by monuments; that it is the duty of the contestees to refrain from going on the claim rather than the duty of the contestant to warn the contestees away; that its right to the Udall Oil Placer Mining Claim has not been abandoned or waived, as testimony concerning production from 1910 continuously to date, was introduced at the hearing; that "discovery, if valid, to establish a mining claim as to a portion, is valid to establish a claim to all"; that title of the contestant or its predecessor is hardly in question, having existed for 60 years, and that the suggestion to apply for patent admits the unsoundness of contestees' entire position.

On January 15, 1945, application was filed for oil and gas lease Los Angeles 056758, which was issued effective February 1, 1948, to Alex. S. Cowie. It included, among other lands, Lot 3, Sec. 33, T. 5 N., R. 19 W., S.B.M., California. This lease was assigned by mesne approved assignments, subject to a royalty interest of 3% to Alex. S. Cowie, to the Western Drilling and Producing Company. On January 24, 1925, an application was filed for Los Angeles 037880, an oil and gas permit, issued to Alonzo Burdge, effective May 19, 1926, which, among other lands, included Lot 1, Sec. 33, T. 5 N., R. 19 W., S.B.M., California. Thereafter, the permit ripened into oil and gas leases 037880-A and 037880-B. The latter included Lot 1, Sec. 33, and became effective on July 29, 1936. On January 3, 1942, the assignment of lease 037880-B to A. W. Brunton was approved. This lease was further assigned, subject to royalty interest of 1½% each to A. W. Brunton and A. S. Cowie and Company, and a royalty interest of 2% to Frank E. Hilton, to Republic Operators, Inc. There are pending for approval further assignments of leases 056758 and 037880-B, the ultimate assignees to be the Volunteer Petroleum Company.

It appears that the Udall Oil Placer Mining Claim (containing approximately 80 acres) was located by Mrs. S. D. Udall, Miss E. C. Udall, Edward Udall and Sophia Udall, on December 2, 1878, and recorded with the Little Sespe Petroleum Mining District, Ventura County, California, on December 21, 1878, in Book A, page 75. It was recorded in the Ventura County, California, records July 23, 1891, in Book 1, Mining Claims, page 304 (Tr. 78, Ex. A). An Amended Notice of the Udall Claim was signed by Richard Gird and James C. Udall on December 30, 1892, recorded January 3, 1893, Book C, page 101 of the Little Sespe Petroleum Mining District records and recorded in the Ventura County, California, records, Book 2, Mining Claims, page 158 (Tr. 18, Ex. B). It was shown that the Udall Mining Claim, containing approximately 80 acres, among other claims, was deeded to the Union Oil Company of California, by James C. Udall, Richard Gird and Nellie Gird, his wife, on June 5, 1895, recorded in Ventura County, California, on September 18, 1895, in Book 45, Deeds, page 555, et seq. (Tr. 123, Ex. F page 562, numbered "25th").

The Udall Oil Placer Mining Claim, when located, embraced unsurveyed land. The claim is described in the aforementioned documents by metes and bounds commencing at the northwest corner, which is also the southwest corner of the Shale Rock Claim, now known as the Connection Claim and was so stipulated at the hearing (Tr. 80).

A witness for the contestant, a field engineer of the Union Oil Company testified referring to a map (Ex. 1) he made, based on his partial on the ground survey (Tr. 16) on the Monday preceding the hearing, when he found and dismantled a mound containing a rock which was partially broken, but contained a figure 4, distinctly chiseled (Tr. 17, 33, 42). It was his belief that this marker was the remains of the original U1C4 stone marking the southwest corner of the Connection Claim and the northwest corner of the Udall Claim (Tr. 35). It was found over 500 feet east of the survey corner of sections 29, 32 and 33 (Tr. 22). He found no markers other than two iron pipes approximately 108 feet apart, generally in the southeast area of the Udall Claim, which tied in with the West Side placer to the south, and another adjacent claim (Tr. 21, 44) which he was convinced was the southern line of the Udall Claim (Tr. 21, 44, 48, 51). On the same day he located the Cosmopolitan No. 2, a well on the Udall Claim, as being south 1002.82 feet from the northwest corner of the Udall Claim and east 966.73 feet, that at that time he observed the well and it was producing (Tr. 22-23). Owing to insufficient time, he did not look for the eastern corners of the Udall Claim (Tr. 21, 24, 49).

Another witness for the contestees related that in 1948 the Union Oil Company first became aware that the Udall Claim was divided into lots, when its then Manager of Lands, the person testifying, observed a legal notice pertaining to the competitive bids being accepted for an oil and gas lease on Lot 2, Sec. 33, T. 5 N., R. 19 W., S.B.M., California. A protest was filed. After investigation the Bureau of Land Management in the same year determined the validity of the Udall Oil Mining Claim based upon several wells having been drilled and oil discovered thereon in 1911, and the production of oil has been continuous since that time (Tr. 53). The same witness further testified that from 1921 to 1949, while employed by the Union Oil Company, reports were received on the production of oil and royalties relating to the Udall Claim, which well he checked several times each year, and he was not aware of the Burdge lease for Lot 1 as there was no evidence of work being done or wells being drilled. (Tr. 54).

Cosmopolitan No. 2 is a well on the Udall Claim under private lease to the Turner Oil Company (Tr. 8). Production records dating back to 1910 indicate that production on the Udall Claim has been continuous since 1910; 19,498 barrels in 1910; 26,562 barrels in 1911; 805 barrels in 1948; 2,281 barrels in 1949; 1,819 barrels in 1950; 1,948 barrels in 1951; 2,095 barrels in 1952; and 2,341.5 barrels for eleven months in 1953. The gravity of the oil now being produced from Cosmopolitan No. 2 is about 33.5 degrees and the present price per barrel is $3.09. (Tr. 8-9).

A mining valuation engineer of the Bureau of Land Management examined Udall Oil Placer Mining Claim on March 5, 1952, in the company of the field engineer of the Union Oil Company. He was able to his satisfaction to locate the position of the Udall Claim on the ground and its relation to the public survey section corner. (Tr. 74, 91). They found the section corner and the northwest corner of the Udall Claim which is the southwest corner of the Connection Claim, but at that time did not tear down the mound. He made no measurements nor took any hearings, but his observations of the Udall Claim began at the northwest corner of the claim. The lotting in section 33 was explained as coming into being by virtue of elimination from that section of the Outlook Mining Claim, Mineral Survey No. 5125, and West Side placer embraced in Mineral Survey No. 5114, and the remnants of the section were designated as lots (Tr. 84). He was of the opinion that there is no way of properly describing in terms of legal subdivisions the exact position of the Udall Claim insofar as it covers portions of lot 3 without a segregation survey (Tr. 87, 88). It is emphasized by the use of Supplemental Plat for section 28, approved January 14, 1935, showing the Connection Claim, the northwest corner of the Udall Claim was established on the ground.

Contestees' Exhibit C, a planemetric map, dated May 1, 1945, of the Sespe Creek Area, Ventura County, California (Tr. 94, 102), was prepared on the basis of an on the ground survey by J. A. Miller of the United States Geological Survey, who had located the Sespe Mineral Monument, and the common corners for sections 28, 29, 32 and 33, T. 5 N.,

R. 19 W., S.B.M., California. It was made for the purpose of determining whether a certain unidentified oil and gas lease was within a known geological structure of a producing oil and gas field (Tr. 102-103). Various mining locations were plotted on this map by a draftsman from the U. S. Geological Survey from data obtained from other plats and reports, official and unofficial. According to the representations on the map, the section line for sections 32 and 33 is 500 to 520 feet west of the western side of the Udall Placer Mining Claim, while on the north side the claim does not coincide with the extension of the section line but is 200 feet to the south (Tr. 95, 103). Mr. Miller, who made the on the ground survey, did not know how the draftsman determined the Udall Claim on his map (Tr. 104), nor did he locate the Udall Claim in his on the ground survey, as he made no attempt to outline claims because he did not know their descriptions at the time. He admitted it was a working map rather than an atlas (Tr. 106-107). The intervener's attorney objected to the map for the reason that the maps in the Land Office are official records until they are so changed. (Tr. 108).

While the contestees intimated that large sums were spent on the lands embraced in leases 056758 and 037880-B, it was admitted that none of the monies were spent in the development of either Lots 1 or 3, sec. 33 (Tr. 113, 125). At the hearing the contestees urged that the plat of Mineral Survey No. 3217, not official, shows the proper location of the Udall Claim (Tr. 122, 131); that complete chain of title had not been shown, but if there was anything present prior to the decision of November 4, 1948 that indicated chain of title, there would be something of record (Tr. 134); that if the contestants have title, it is not intended to disturb that portion of the Udall Claim on which they have produced, but the part they appear to have abandoned should be excluded.

The contestant, at the hearing, asserted ownership and possession for nearly 60 years; that Udall Oil Placer Claim is a properly located claim with commercial discovery of oil in production since 1910; that discovery anywhere on the claim validates the whole claim; that the mining valuation engineer of the Bureau of Land Management established the location on the ground of the Udall Claim in connection with supplemental plats showing the adjoining placer mining claim (Tr. 128).

Oil and gas leases 056758 and 037880-B were issued pursuant to the Mineral Leasing Act of February 25, 1920, supra, included Lot 1, and part of Lot 3 in section 33, which are lands assertedly covered by the Udall Oil Placer Mining Claim. The contestees repeatedly stress that complete title to the Udall Placer Mining Claim is not shown in that there is no evidence of a conveyance from the locators to the Union Oil Company's grantors and, therefore, the contestant has no standing to contest the oil and gas leases hereinbefore described to the extent that they allegedly conflict with the Udall Claim. In their appeal the contestees urge the Department to request the Union Oil Company to file for and obtain a patent to the Udall Oil Placer Mining Claim, according to contestees' suggested description, in order to protect the contestant's lessee, which apparently concedes the Union Oil Company's right to possession of the claim. A contestant is not required to show full ownership in order to initiate a contest under 43 CFR 221.1(a) (1949 ed.)/1 . The contestant herein has been in open, uninterrupted possession of the Udall Claim since 1895, when the claim was conveyed to it. It is noteworthy, that in proceedings to try the right to possession the courts have held, pursuant to the provisions of Section 2332 Revised Statutes (30 U.S.C., 1952 ed., sec. 38), one in actual exclusive adverse possession of a mining claim for many years (in conformity with the Statute of Limitations for mining claims in the state where the claims are located) prior to the filing of a complaint is the owner of the same and has a right to the sole and exclusive possession thereof against the whole world save with respect to the interest of the United States. *Phelps v. Pacific Gas & Electric Co.*, 246 P. 2d 997; *Lind v. Baker, et al.*, 88 P. 2d 777; *Alice Firth Clark*, 57 I.D. 244. (1941). Other records of the Bureau of Land Management indicate that according to the Ventura County, California, records one of the contestant's grantors, J. C. Udall, acquired title to the Udall Oil Placer through Notice of Forfeiture in an action against S. D. Udall, et al., and is recorded in Vol. 2, page 75, Mining Claims. It appears that the Union Oil Company of California has sufficient interest to initiate this private contest under the provisions of 43 CFR 221.1(a)(1949 ed.).

Section 37 of the Mineral Leasing Act, /1a excepts from leasing, deposits of oil, gas and other minerals therein referred to in lands valuable for such minerals in "valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery". In order to come within the purview of the saving clause of the Mineral Leasing Act, a mining claim must have been a valid claim on February 25, 1920, the date of enactment of the act, by a discovery having been made within the limits of the claim or by diligent prosecution of work thereon with a view to discovery.

The Union Oil Company must show that prior to February 25, 1920, oil on the Udall Oil Placer was discovered, or that on that date diligent work looking to a discovery was being prosecuted and was diligently being pursued until discovery, *Starks v. Mackey et al.* 60 I.D. 309(1949)., and that production has continued to the present. A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. *Chrisman v. Miller*, 197 U.S. 313(1905); *Monolith Portland Cement Co.*, et al., 61 I.D. 43 (1952). Moreover, but one discovery of mineral is required to support a placer location embracing from 20 to 160 acres.

/1 This read in part:

"Contests may be initiated by any person seeking to acquire title to, or *claiming an interest in*, the land involved ***"
(Emphasis supplied.)

/1a (30 U.S.C. 1952 ed., § 193)

See 43 U.S.C. A sec. 35 note 39 and 43 CFR 185.25 (1954 ed.). In determining whether mineral deposits discovered on public lands are valuable, the test to be applied is whether they are "such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. Cameron, et al. v. United States, 252 U. S. 450; Monolith Portland Cement Company, et al., supra.

Undisputed evidence presented on behalf of the contestant discloses that a discovery of oil was made in 1910, and that production has continued through the years to the present on the Udall Claim. Contestant's witness, Mr. Lane, testified that while making an on the ground survey a few days prior to the hearing, he found the producing Cosmopolitan No. 2 well to be from the northwest corner of the Udall Claim 1002.82 feet south and 966.73 feet east. Thus, the well is clearly within the limits of the Udall Claim.

As was previously stated at the time the Udall Claim was located, township 5 N., R. 19 W., S.B.M., California, was unsurveyed. Much was said at the hearing by the contestees with regard to the position of the Udall Claim on the ground and its graphic position as shown on numerous plats and maps, official and unofficial. The Miller planemetric map (Ex. C) is not convincing as Mr. Miller stated that the mining claims plotted thereon were not surveyed by him. Since the Udall Claim was located, various claims adjacent to the Udall Claim have been patented and are represented on official plats. The location and amended location descriptions of the Udall Claim begin at the northwest corner of the Udall Claim, which is the southwest corner of the Connection Claim. Mr. Kinsley and Mr. Lane have testified that each was convinced that the rock mound and a corner which they found on the ground was the southwest corner of the Connection Claim and the northwest corner of the Udall Claim. While the relationship of the northwest corner of the Udall Claim with the common corner for sections 29, 32 and 33 is uncertain and immaterial, the alleged variances interposed by the contestees in either a north to south or east to west direction from the common corner, are not convincing and would not be such as would place the position of the producing Cosmopolitan No. 2 Well outside of the limits of the Udall Claim. Nor would it eliminate the total conflict of Lot 1 /2 and part of Lot 3 with the Udall Claim. The indefiniteness relates to the extent of conflict between the Udall Claim and Lot 3 and its extent is ascertainable only by a proper survey authorized by the Bureau of Land Management. A survey of the Udall Claim would also determine the lands not within the claim. Therefore, until such a survey is made they cannot be identified for leasing purposes.

A mining claim is not initiated by application made at the local land office. A right in a mining claim is established by a series of acts, including discovery of valuable mineral deposits and recording the claim in the manner required by the applicable state laws (30 U.S.C., 1952 ed., secs. 22-28). There is no general requirement under the mining laws that a location notice must be filed with the United States, /3

/2 See Tr. 2, 3, 125.

/3 Cf. Mining Claims Restoration Act of August 11, 1955 (69 Stat. 681; 30 U.S.C. Supp. IV, sec. 621 et seq.)

either at the l[illegible]l land office or elsewhere. Th[illegible] contestees and their predecessors are charged with notice of the county mining records and the fact that the contestees have paid annual rental on Lots 1 and 3 for many years, does not give rise to any rights. *Cf. Opinion of the Comptroller - General*, B-123118, July 1, 1955.

Another contention is that the Union Oil Company has abandoned the Udall Claim in part. Abandonment is based upon act and intent. See *Snyder* on *Mines* (1902) § 512. *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1934); *Wilbur* v. *Krushnic*, 280 U.S. 306(1929). The evidence of continuous production of oil on the Udall Claim since 1910, controverts such intent. As was previously stated, only one discovery is necessary to validate the entire claim.

Another alleged equitable defense asserted by the appellants is that large sums of money have been spent on drilling and for roads, over a period of years, while the Union Oil Company remained silent. Testimony at the hearing clearly discloses that the expenditures were made on other lands in the contested leases not the subject of this contest. (Tr. 113,125).

The contestees urge as an equitable solution in order to protect the contestant's lessee, that the Union Oil Company be required to apply for a patent of the Udall Claim in conformity with an amended description of the Udall Claim, suggested by the contestees. A claim owner, the United States Supreme Court said, in *Wilbur v. Krushnic*, 280 U. S. 306, "is not required to purchase the claim or secure patent from the United States, but so long as he complies with the provisions of the mining laws, his possessory right, for all practicable purposes of ownership, is as good as though secured by patent." It follows that there is no authority to compel an owner of a mining claim to initiate proceedings to obtain a patent.

Accordingly, the Manager's decision declaring Udall Oil Placer Mining Claim valid; cancelling oil and gas leases Los Angeles 056758 and 037880-B to the extent of their conflict with the Udall Oil Placer Mining Claim; and leaving for future determination the extent of the conflict on the ground, was correct, and is hereby affirmed.

Mr. Alex. A. Cowie, Mr. A. W. Brunton, Western Drilling & Producing Company and Volunteer Petroleum Company are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the *Director, Bureau of Land Management, Washington 25, D. C.*, in time to be received there within 30 days after receipt by the appellants of this decision, and must be accompanied by a $5.00 filing fee for each oil and gas lease. Each appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the *Secretary of the Interior, Washington 25, D. C.*, in time to be received there within 30 days after the notice of appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp. Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See information sheet attached.

If appeal is taken by any party designated above then he must serve a copy of all documents on the adverse party, Union Oil Company of California, Union Oil Building, Los Angeles 17, California, within 15 days after filing the document and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within, 15 days after service, unless such proof accompanied the Notice of Appeal.

(sgd.) Earl J. Thomas

Earl J Thomas

Acting Director

Attachment

DISTRIBUTION:
Mr. Alex. A. Cowie (Certified Mail)
Mr. A. W. Brunton (Certified Mail)
Western Drilling & Producing Company (Certified Mail)
Volunteer Petroleum Company (Certified Mail)
Union Oil Company of California (Regular Mail)
Regional Solicitor, Dept. of the Interior, San Francisco (Regular Mail)
Geological Survey (6)
Minerals Staff Officer (5)
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Each Case File
Appeals List No. 1
WHW

In reply refer to:
Carson City 021512
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 28, 1957

Certified Mail
Return Receipt Requested

DECISION

F. L. Morledge : Silica Sand Lease

Assistant Director's Decision of February 4, 1952, Amended

F. L. Morledge has appealed from a decision of the Assistant Director, Bureau of Land Management dated February 4, 1952, rejecting his application for a renewal of silica sand lease Carson City 021512. The Assistant Director's decision provided, however, that a new application for renewal could be made by Mr. Morledge provided he met certain stipulations, including payment of $6,798.66, the amount of royalties, as determined by the Geological Survey, still due the United States. Mr. Morledge appealed only this last provision requiring the payment of back royalty. A new application and an appeal were filed at the land and survey office, Reno, Nevada, February 29, 1952. The new application met all the requirements set forth in the decision of February 4, except the payment of the back royalties. That part of the decision requiring the payment of this royalty was appealed. The appellant claimed that the value of the silica sand at the mine, which was the basis for determining the royalties due, had been incorrectly computed. He stated that the Geological Survey had allowed a haulage charge deduction of 35 cents per ton in computing the value of the sand, while the actual haulage charges were 90 cents and $1.00. In view of the wide difference in values claimed by Geological Survey and by Mr. Morledge in his appeal, the Director determined that a reconsideration of his decision might be necessary and on April 7, 1952 he ordered a hearing. The hearing was held on April 25, 1956 before John R. Rampton, Jr., Hearing Officer, at Las Vegas, Nevada.

At the outset the Hearing Officer stipulated that the hearing was to be only a fact-finding procedure, and that he would not render a decision but only forward his recommendations to the Director.

The testimony at the hearing follows:

FRED L. MORLEDGE, the appellant, was sworn and testified that he is one of the lessees named in the lease, Carson City 021512, and is now doing business under the name of West Coast Silica Company. He stated that he had never sold any sand to West Coast Silica Company but that all of the silica sand mined was sold and shipped from the leased premises direct to Brumley-Donaldson Company of Los Angeles, with perhaps some being sold to the Owens-Illinois Pacific Coast Glass Company. He states that the amount received for the silica sand f.o.b. railroad as listed in appellee's exhibit No. 1 is correct. During the period covered by appellee's exhibit No. 1, all of the hauling was done under contract with G. M. Perkins, Dale Perkins, F. H. Langford, M. J. Bagshaw, and Noel A. Clark. He stated that during the contract with G. M. Perkins he paid Mr. Perkins $1 per ton for hauling the material from the deposit to the railroad, and that there was a time when Mr. Perkins was paid 90 cents a ton for such haulage. Because Mr. Perkins became dissatisfied with this arrangement, Mr. Morledge was forced to acquire his own equipment at which time he bought two trucks and hired F. H. Langford as a contractor hauling at a flat fee per ton or per car. The witness stated that he furnished all of the equipment and all of the maintenance, repairs, and supply. He estimated that such mode of operation was more expensive than paying to have the sand hauled, and was a very unfortunate experience. In October 1950 he engaged in a contract with Noel A. Clark.

He identified appellant's exhibit B as the original statements for loading sand by Dale B. Perkins, starting in October 1944 and continuing through July 1946. He identified appellant's exhibit C as a copy of the letter written to Brumley-Donaldson Company in which he stated: "Starting August 1, 1946, the price for our 'Fire Valley Silica Sand' will be $0.50 per ton f.o.b. mine, and it will be up to you to get this into cars at the railroad shipping point, Amber, Nevada." He stated that this arrangement was continued until July 31, 1953.

For the period August 1, 1952, to July 31, 1953, he said that the price received was $1.65 per ton and the hauling cost 90 cents per ton; and from July 31, 1953, to April 30, 1956, the price received was $1.90 a ton f.o.b. cars, Amber, Nevada, with a hauling price of $1.10 per ton paid to Noel A. Clark.

Under cross-examination, Mr. Morledge testified that during the period he sold sand to Brumley-Donaldson Company at 50 cents a ton he provided equipment for a contract-hauler to do the work and that Brumley-Donaldson Company paid the hauling cost which was billed separately for the hauling and for the sand. He stated that since August 1, 1953, he had set up a screening process at the railroad and that the costs paid to Mr. Langford (reimbursed by Brumley-Donaldson Company) included the cost of excavating the sand at the site, loading it into the railroad cars direct from the truck. The witness admitted that the "hauling" charge included the entire operation of loading the sand at the site, hauling the sand to the railroad, and dumping it into the railroad cars. This also included, for a short period of time, the expense of screening the sand. He stated that from the period of October 1, 1948, to July 31, 1953, the sand was sold f.o.b. site, for 50 cents per ton; that since July 31, 1953, the sand had been sold f.o.b. cars for $1.90 per ton.

Mr. Morledge was shown appellant's exhibit B and his attention was called to the statement underneath the columns which reads, "Fines -

60.65 tons @ 25 cents." He stated that this was in reference to very fine sand for which his customer had a specific use and that the sand was loaded by hand by the truckers with shovels, and for this they were paid an additional 25 cents per ton.

He estimated the distance of the haulage from the pit to the railroad as being not more than five nor less than four miles. He stated that the entire length of his pit would be about half a mile and that the maximum distance he would ever haul from the outermost end of the pit to the railroad would be approximately 5.5 miles.

He testified that he had paid for the construction of the road from the pit to the railhead prior to the acquisition of the lease in 1944, and stated that although he was not able to give a figure on the yearly maintenance cost that it would not amount to a great deal.

On redirect examination, he stated that during the period in which he installed a screening plant at the deposit he added 25 cents to the cost of delivering the sand to the railroad for this operation for the purpose of amortizing the screen and to pay the additional cost of screening.

FOUNTAIN LANGFORD, a witness for the government, testified that he was employed by the appellant, Mr. Morledge, to haul silica sand for a period of slightly less than two years between 1947 and 1949. He was employed under an oral contract, and it was agreed that he was to get 50 cents a ton for hauling, furnishing labor, loading the sand, and maintaining the equipment. Mr. Morledge was to furnish the equipment, gas, and oil. He estimated that approximately two-thirds of his time in the operation was spent in the haul from the pit to the railhead. The remaining third of his time was spent in maintenance of roads, repairs to trucks, pushing sand to the trap, and piling it up for quick loading. When he reached the railhead it was necessary for him to spot the car in position to the ramp, clean the car, paper it in case there were any holes in the bottom of the car, and then dump the sand from the truck into the car. All of these operations, including pushing the sand to the trap and spotting the car and dumping, were included in the figure of 50 cents a ton.

GEORGE MORRIS PERKINS, a witness for the government, testified that he was employed by Mr. Morledge in loading and hauling sand for a period in 1946 and that he was employed by the Brumley-Donaldson Company from June 1946 for approximately one year. He could not recall exactly but believed that during the time he was employed by Mr. Morledge he received $1 a ton. For this price he conducted all of the operation, including extracting the sand from the pit, loading it onto his trucks, hauling it to the railhead, and dumping it into the rail cars. He was required to perform all of the normal maintenance on the road and to furnish his own gas and oil. He stated that approximately 65 percent of the time of the entire operation was spent hauling on the road. He also stated that some days he would spend half a day in preparing the sand at the pit and half a day hauling, and that the time spent in preparing the sand was included in the one price received for hauling.

ALBERT F. CZARNOWSKY, a mining engineer employed by the United

States Geological Survey, testified that he visited the land embraced in the silica sand lease, Carson City 021512, on the 24th of April 1956. With the speedometer on his car he measured the distance from the head of the pit to the railhead as being 3.8 miles.

He was asked on cross-examination whether his speedometer had been calibrated and answered that it had not but that in driving the mileage as he does every year he checks distances accurately between towns and highway markers.

GEORGE G. BYWATER, the regional mining supervisor for the United States Geological Survey, was sworn and testified that in his capacity as regional supervisor that he supervised the prospecting, development, and operation for minerals under the leasing act, public domain, and acquired lands, and all minerals on Indian reservations. He stated that the silica sand lease, Carson City 021512, is the type of lease included under his supervision. His attention was called to appellee's exhibit No. 1 and to the column headed "haulage allowance per ton" which shows the rate of 35 cents per ton between the period 1944 until March 31, 1952, and he was asked how the United States Geological Survey established that figure. He answered that it was established from the Geological Survey's experience throughout the district, and that they rated the average at 7 cents a ton-mile, which at the time the rating was made was from one to two cents per ton-mile in excess of the average contract haulage throughout this district. By district he meant the area lying in western Wyoming from Rawlins west to the State line and north to Lander; Idaho, south of the panhandle; and the States of Utah, Nevada, Oregon, and California. The 35 cents hauling allowance per ton is an allowance of 7 cents a ton-mile for the five-mile distance computed from the mining site to the railhead.

In deriving 7 cents a ton-mile, he had taken into account the lease on the Ft. Hall Indian Reservation by the Simplex Company (now the J. R. Company). In this operation the mine is 17 miles from the railhead, and the Simplex Company deducted from the price that they received at the railhead 95 cents a ton for haulage. During that period the company constructed 17 miles of road and in 1949 paved 11 miles of road, and the haulage deduction remained the same (95 cents a ton). From 1951 until the present time the Monsanto Chemical Company operated a phosphate mine in Idaho located about 17 miles from the plant at Soda Springs. The Morris Knudsen Company (the hauling contractor) constructed and paved seven miles of road. Their contract haulage price was and now is 6-1/3 cents a ton-mile. He stated that to his knowledge some hauling is done much more cheaply than that over a distance of 125 miles.

The witness stated that he had visited the site covered by the lease involved in this proceeding and that he had been over the road from the pit to the railhead. He stated that in some ways traveling is more difficult on the road from the pit to the railhead in connection with the silica sand lease in question than on the other roads where the haulage charge is 7 cents per average ton-mile, primarily because the haulers on the other roads had constructed exceptionally good roads over which to haul because they had found it to be more economical. He stated that the 7 cents per ton-mile was not considered to be a factor in building the road in the first place nor in the general road maintenance, but was for actual haulage only.

Beginning October 1, 1952, he increased the allowance per ton for the five-mile haul relating to the silica sand lease in question from 35 cents to 60 cents because the cost of hauling had increased; labor had become more expensive and the cost of equipment and operating expenses had become higher.

Mr. Bywater stated that the Geological Survey interpreted the arrangement between Mr. Morledge and the Brumley-Donaldson Company as being in the nature of an overriding royalty. The witness stated that an overriding royalty represents payment to the lessee for the money that he had expended, the development that he had done, and the time that he had put in upon the development of the deposit, or, that it represents payment by a sub-lessee to a lessee for the privilege of mining the material. In connection with his observation of the operation under the lease in question, he said he had fixed the gross value of the mine material at the site by obtaining the price received at the railhead by the vendor and subtracting from that the cost of haulage from the pit to the railhead. He admitted that he had made only a cursory examination of the operation on the land under the lease in question. He had arrived at the figures under "haulage allowance per ton" on appellee's exhibit No. 1 arbitrarily, based on his knowledge of the costs of haulage and the operation of truckers, and stated that it would represent a maximum figure.

The witness admitted under cross-examination that the shorter the haul the more costly per ton-mile it is, and admitted that the figures for a 17-mile haul in Wyoming and Idaho were not exactly applicable to the silica sand lease in question. He also stated that his figures contemplated a steady haul, that is three or four or more months at a time. When asked whether the cost per mile would increase if the operation was an intermittent one, he stated that it would depend on whether or not the hauler was paid by the day or only during the time he was employed.

Mr. Morledge, the appellant, was recalled to the stand and testified that his operation was an intermittent one. The orders for material were received by telephone and there were days when there were no orders and the equipment was not worked. He said that sometimes a telephone order would be received at 10 o'clock in the morning and then he would have to call upon the trucker to load the car immediately in order to get it on the train by the next day. The equipment was sometimes used one day followed by a two-day layoff, and then used perhaps a half-day for loading a single car.

During the year 1934-35 he paid 25 cents a ton to have material hauled four miles from a hopper in a different mining operation. In 1936-37 that charge was 35 cents per ton on a continuous two-truck operation working 24 hours a day and transporting the material exactly four miles.

NOEL A. CLARK was sworn as a witness and testified that he is a loading and hauling contractor and that he has a contract per ton to haul the sand for Mr. Morledge. He stated that he had been in this operation for approximately five years and that his present relationship is approximately the same as when he first started with Mr. Morledge. His written contract specifies that he shall received $1.10 per ton for loading and hauling sand from the deposit to the railhead and that he should maintain all the working appurtenances and appliances. He owns his own trucks.

Recently he had occasion to analyze his operation and found that skimming the dry sand from the wet sand and stockpiling it near the track so that it could be pushed into a truck took approximately 7 hours to accumulate 10 carloads. When the road is in good condition, 35 minutes are required for a round trip per truck, but at the present time the round trip is requiring 45 minutes. He said that the percentage of time consumed in preparing the sand prior to loading it into the truck is approximately 15½ percent of the total time involved. The balance of the time is taken in hauling and preparing the railroad car. He stated that the maintenance of the road was a joint venture more or less between Mr. Morledge and himself, and that Mr. Morledge had supplemented his $1.10 last year by putting a grader on the job.[1/] When he hauls the sand to the railhead he runs it through a screening plant. The bin of the screening plant holds approximately 24 tons and the truck man, on every second load, goes down and moves the car, which consumes probably two minutes. On every other load, the trucker never stops but backs up to the ramp and dumps the sand out of the truck into the bin. He also stated that he must keep his "Cat" sitting by the pit all of the time available for operation because he is sometimes called on to load a car almost instantly, and outside jobs which are few and far between do not work out. His sole employment at the present time is hauling sand under his agreement with Mr. Morledge. He stated that he had six different pieces of equipment and had never gotten the same speedometer reading from any of them, and therefore he could not answer the question as to what the hauling distance was at the present time.

He stated that he does other hauling for Mr. Morledge in addition to what he does in connection with the silica sand lease in question, that this hauling is done south of Overton, and that he is paid 70 cents a ton for a haul of approximately one mile. He stated that the $1.10 figure is barely adequate for the expenses incurred in his hauling, and that he did not receive any profit from it. He computed that he received wages for himself. He has tried to influence Mr. Morledge to pull out of the Amber operation and to work on another deposit they have where the haul would be less costly. He stated further that he had worked approximately 17 days out of the last 25.

[1/] The written contract between Morledge and Clark, Article 1, paragraph 3, provides that Mr. Clark shall maintain the road between "Red Gourge Ground and Amber Siding" at his own expense.

Mr. Morledge stated in his appeal, p. 6, as amended at the hearing (Tr. 4) that during the period October 1, 1944 to July 31, 1946, he received $1.25 per ton for the silica sand f.o.b., railroad, and in his testimony (Tr. 13) he stated that the haulage charge was $1.00 and at other times $0.90 per ton. He stated that from August 1, 1946 until July 31, 1953, the sand was sold direct to Brumley-Donaldson Company f.o.b. pit for 50 cents per ton and that the haulage charge was paid by Brumley-Donaldson Company directly, from August 1, 1946 to October 30, 1948, and by separate billing and reimbursement thereafter.

It is difficult to reconcile these allegations with Mr. Morledge's statements that during the period October 1, 1948 to July 31, 1953, the price received for the sand f.o.b. railroad was $1.65 with a haulage charge of $0.90 per ton. When asked about this discrepancy in his statements, he stated that the selling price during that period was 50 cents a ton and that he had no evidence on the hauling cost for that particular period. (Tr. 31).

The weight of evidence indicates that Mr. Morledge arranged for the hauling during part of the time that Mr. Perkins was engaged in this hauling and during the entire time that Mr. Langford and Mr. Clark have been hauling the sand from the pit to the railroad, and that in reality the sand was sold f.o.b. pit to Brumley-Donaldson Company only for a short period after 1946.

The testimony disclosed that the price included in the haulage charge from pit to railroad, as testified to by Mr. Morledge, included the entire operation of piling the sand for loading and loading the sand onto the trucks for subsequent transportation to the railroad. As that portion of the haulage charge which includes the extraction of the sand and the screening prior to loading cannot be considered a legitimate haulage charge, the proportionate expense which includes all of the operation except actual haulage must be deducted from the haulage charges for the purpose of computing the amount of royalties due under the lease.

The best evidence as to the proportion of the operation which must be considered as mining and loading rather than actual transportation and which must be deducted, therefore, from the haulage charge in computing value of the sand at the mine, was given by Mr. Clark who testified that he had made a study of his operation that found that approximately 15½ percent of the time and labor involved in the entire operation included skimming the dry sand from the wet sand and stockpiling it near the track and pushing the sand from the track onto the truck.

Although Mr. Morledge stated that the upkeep and maintenance of the road was a joint operation, the agreement between him and Mr. Clark stated under article 1, paragraph 3, that the second party (Mr. Clark) agreed "to maintain the road between the Moapa silica ground and the

Lake Mead siding and between the Red Gourge Ground and Amber Siding at his own cost and expense." It is, therefore, apparent that any expense incurred by Mr. Morledge in the upkeep of the roads is purely voluntary.

Mr. George Bywater testified that he had set the haulage allowance shown in appellee's exhibit No. 1 arbitrarily and based upon his knowledge of similar operations in the western states. However, he admitted that various factors may affect this hauling charge, such as the distance of the haul, the condition of the roads, and whether or not the operation is a steady or intermittent one. He admitted that the hauling from the pit to the railhead in this particular instance is more difficult than on other roads that he had observed, primarily because the haulers on the other roads had constructed exceptionally good roads because they had found it economical to do so.

It was further shown that it is necessary to keep the mining equipment at the pit at all times because orders come in which must be processed immediately, and that it is not possible to permit the equipment to be used on other projects, a factor which would undoubtedly increase the costs of the entire operation.

Mr. Bywater's testimony, then, as to the haulage allowance cannot be considered conclusive for this particular case.

Accordingly, the value of $.35 per ton for haulage as established by the Geological Survey does not appear to be an accurate estimate of the actual cost of haulage which under the earlier Departmental decision on this lease, F. L. Morledge, U. V. Perkins, A-24271, August 22, 1946, is deductible from the f.o.b. railroad price of the sand in computing value at the mine.

Therefore, based on the foregoing summary and evaluation of the evidence, the Assistant Director's decision of February 4, 1952, upon reconsideration and in the light of the facts adduced at the hearing is amended to establish royalties due as follows:

1. That during the period October 1, 1944 through December 31, 1944, the sand was sold f.o.b. railroad for $1.25 per ton; that the charge for transportation from mine to railhead was $1.00 per ton, of which 15½ percent (15½ cents) should be deducted as being attributable to mining and loading; and that the value of the sand at the mine, therefore, was 40½ cents per ton.

2. That during the period January 1, 1945 through July 31, 1946, the sand was sold f.o.b. railroad for $1.25 per ton; that the charge for transportation from mine to railhead was $.90 per ton, of which 15½ percent (14 cents) should be deducted as being attributable to mining and loading; and that the value of the sand at the mine, therefore, was 49 cents per ton.

3. That during the period August 1, 1946 through October 30, 1948, the sand was sold direct to Brumley-Donaldson Company f.o.b. mine

for 50 cents per ton, and that Brumley-Donaldson Company arranged and paid for all expenses of hauling from the mine to the railroad.

4. That during the period October 31, 1948 through September 30, 1949, the sand was sold f.o.b. railroad for $1.65 per ton; that the charge for transportation from mine to railhead was $.90 per ton, of which 15½ percent (14 cents) should be deducted as being attributable to mining and loading; and that the value of the sand at the mine, therefore, was 89 cents per ton.

5. That during the period September 30, 1949 through July 31, 1953, the arrangements were the same as in paragraph 4 above and the value of the sand at the mine was also 89 cents per ton but the royalty was the minimum 10 cents per ton set forth in the director's decision of February 4, 1952, and agreed to by Mr. Morledge in his appeal.

6. That during the period August 1, 1953 through April 30, 1956, the sand was sold f.o.b. railroad for $1.90 per ton; that the charge for transportation from mine to railhead was $1.10 per ton, of which 15½ percent (17 cents) should be deducted as being attributable to mining and loading; and that the value of the sand at the mine, therefore, was 97 cents per ton, however, the minimum royalty of 10 cents per ton is again applicable.

Based on the above principles the amount of money due the United States through September 30, 1949 is $912.05, computed as follows:

Period	Tons Shipped	Value Per Ton At Mine	Royalty Per Ton	Total Royalty Due
10/1/44 - 12/31/44	5003.71	.40½	$ .0405	$ 202.65
1/1/45 - 7/31/46	26, 353.73(a	.49	.049	1291.33
8/1/46 - 10/31/48	29,374.95(b	.50	.050	1468.75
10/31/48 - 9/30/49	7819.72(c	.89	.089	695.96
Total Royalty Payments Accrued to 9/30/49				$ 3658.69
Account Payments 10/1/44 to 9/30/49				2746.64
		Amount Due		$ 912.05

a) Quarterly reports plus amount shipped in July 1946 per Exhibit "B"
b) Quarterly reports less amount shipped in July 1946 per Exhibit "B" plus 1/3 of amount shipped last quarter 1948
c) Quarterly reports less 1/3 of amount shipped last quarter 1948.

Since from October 1, 1949 to December 31, 1955 the lessee has paid royalty at the minimum rate of 10 cents per ton, and since for this period that minimum rate is the amount determined to be due, no additional unpaid royalties are considered to have accumulated between these dates.

The amount of royalty due on any sand mined since January 1, 1956, will be computed on the same principles as set forth above.

Upon payment of all royalties still due the United States, the application for extension of lease Carson City 021512 from October 31, 1949 to September 30, 1954 will be approved, if all else be regular.

The lessee must file an application for extension of the lease beyond September 30, 1954 in the Reno Land Office within 30 days of the time this decision becomes final, and its approval will be subject to the same terms and conditions set forth above.

Since this lease expired September 30, 1949, trespass action for all occupancy and mining since that day, may be instituted unless the lessee makes payment of all back royalties due the United States and files an application for extension of the lease beyond September 30, 1954, within the time allowed.

Mr. F. L. Morledge is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950, as amended by Circular No. 1962. See Information Sheet attached.

Edward Woozley

Director

Attachment

DISTRIBUTION:

Mr. F. L. Morledge (Regular Mail)
Mr. Leo A. McNamee, Attorney (Certified Mail)
Geological Survey (6)
National Park Service (3)
Appeals List No. 1
VJR
Minerals Staff Officer (5)

In reply refer to:
Los Angeles 056116
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

November 14, 1957

Certified Mail
Return Receipt Requested

DECISION

I. Stanley Burgess and Joseph McGinty : Potash Prospecting Permit

Rejection of Potash Prospecting Permit Application Affirmed

I. Stanley Burgess and Joseph McGinty have appealed from a rejection of their application for a potash prospecting permit, filed under the provisions of the Mineral Leasing Act, as amended (30 U.S.C. sec.281). The application was rejected for the reason that the lands applied for are withdrawn for use of the Department of the Army and not subject to potash permit or lease.

The lands involved were "withdrawn from all forms of appropriation under the public-land laws including the mining laws, subject to valid existing rights, for the use of the War Department as a bombing and gunnery range" by Executive Order 8450, dated June 20, 1940.

Even though the lands involved in this appeal may be subject to lease under the provisions of the Mineral Leasing Act despite the withdrawal, such leasing is discretionary with the Department. Cf. United States ex. rel. Jordan v. Ickes, 143 F. 2d (App. D.C. 1944), certiorari denied, 323 U.S. 759. Where the issuance of a prospecting permit or lease of the lands sought would interfere with the use of the lands for the purpose for which they were withdrawn, it is proper to reject applications for such permits or leases. Cf. Earl J. Boehme et al., 62 I.D. 9 (1955); George E. Kohler, Sr., et al., A26412 (January 9, 1953); Gerald W. Anderson, A-26297 (February 13, 1952).

The Department of the Army has reported that-

> "It has been determined that use of the above-mentioned land for the purpose of mining potassium would interfere with military operations at the Edwards Air Force Base. Therefore, any pending application for a potassium permit cannot be favorably considered".

Since the department having jurisdiction of the lands has stated that mining operations would interfere with its use of the lands and has objected to the issuance of a permit, the application was properly rejected. Therefore, the decision appealed from is affirmed.

Messrs. Burgess and McGinty are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D.C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee.

An appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D.C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp, Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

Edward Woozley
Director

Attachment

DISTRIBUTION

I. Stanley Burgess: (Certified mail) 1628 West Blvd., Los Angeles 6, Calif.
Joseph McGinty: (Certified Mail) P.O.Box 746, Boron, Kern County, California.
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List 1
BF

appeal to Sec
affirmed A-27614 - 7/30/58

In reply refer to:
Los Angeles 0140572
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

November 27, 1957

Certified Mail
Return Receipt Requested

DECISION

Frank M. Darrow	:	Sodium Permit Application

Manager's Decision Affirmed

Frank M. Darrow has appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Los Angeles, California, dated May 16, 1957, to the extent it rejected his sodium prospecting permit application, Los Angeles 0140572, filed under section 23 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 261), for certain lands in the Searles Lake area, for the reason that such lands were classified as valuable for sodium and therefore were subject only to leasing under section 24 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 262). He has requested, also, a recheck of the status of prior filed sodium permit applications, Los Angeles 0104433 and 0132957, to verify that the lands sought therein are in fact identical to lands for which he applied under Los Angeles 0140572, as reported by the Manager, and therefore to ascertain whether the applications do conflict with each other. He expresses the belief that appeals involving the prior filed applications have long since been decided.

The record shows that, of the lands applied for by Mr. Darrow, with respect to which he has appealed, the following were applied for by others previously, as reported by the Manager in his decision:

(a) Lot 2, SW¼ sec. 19, T. 25 S., R. 44 E., M.D.M., California, applied for by Edwin M. Scott, Jr., on May 12, 1953, under application Los Angeles 0104433; and
(b) SW¼NW¼ sec. 32, T. 25 S., R. 44 E., M.D.M., California, applied for by David R. Denny, on May 13, 1955, under application Los Angeles 0132957.

All of the described lands, as well as the lands for which the appellant herein applied and which were not reported as in conflict with any other application for sodium permit,[1] have been classified, with other lands, as suitable for lease through competitive bidding.

In a decision of this office dated September13 , 1957, relating to appeals involving rejections of sodium permit applications Los Angeles 0104433, 0104434, 0107853, 0127124 and 0132957, which decision was approved by the Assistant Secretary of the Interior on September 26, 1957, it was stated with respect to classification of the above-described lands, and other lands in the area, as follows:

> "The sodium prospecting permit applications of the appellants, with the exception of the Denny application, were each filed in 1953. During the time that their applications were pending, the Department considered the protests of Frank M. Darrow and Howard W. Dougherty to the classification of the identical lands involved in this appeal, as known sodium lands, subject to leasing. In its decision of April 15, 1955 (A-27053, A-27057), the Department held that in the absence of proof to the contrary the findings of the Geological Survey were binding upon the Bureau of Land Management, and that the classification of the lands as known sodium lands will not be disturbed. The same conditions, as are involved in this appeal, prevailed in the Darrow case. The appellants, during the pendency of their appeals, submitted no additional evidence. The factual data concerning the Searles Lake sodium deposits on file with the Bureau is sufficient to properly determine the issues involved. In such case, it is proper to deny a request for a hearing under 43 CFR 221.6.
>
> "The appellants have submitted no evidence to controvert the classification of the lands as known sodium lands. The testimony submitted on appeal is a duplication of and cummulative to the evidence previously considered by the Bureau, both in the cases here involved and in the Darrow case, supra. Inasmuch as the leasing of lands known to contain valuable deposits of sodium by competitive bidding is mandatory if the lands are to be leased at all (30 U.S.C., sec. 262), a prospecting permit for lands known to contain commercially valuable deposits may not be issued under 30 U.S.C., sec. 261. Burnham Chemical Co. v. Krug, 81 F. Supp., 911, 181 F. 2nd 288, 340 U.S. 826.
>
> "Therefore, the Manager's decision, rejecting each of the appellant's sodium prospecting permit applications is affirmed.
>
> "The Manager is directed to proceed with the sale by public auction."

In conformity with the rulings in the decision referred to above, which carries the approval of the Assistant Secretary of the Interior, the allegations of the appellant herein are considered insufficient to warrant a modification of the classification of the lands involved in this appeal as valuable for sodium deposits and therefore as suitable for leasing under section 24 of the Mineral Leasing Act, supra. The decision of the Manager was correct, and it is hereby affirmed.

---

[1] W½E½, SE¼NE¼, E½SE¼ sec. 30, NE¼, E½SE¼ sec. 31, T. 25 S., R. 44 E., M.D.M.

Mr. Darrow is allowed the right of appeal herefrom to the Secretary of the Interior. However, any such appeal will not serve to defer the proposed leasing of the sodium lands here considered, in view of the last sentence in the decision referred to above, reciting that the Manager is directed to proceed with the sale.

If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D.C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D.C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950, as amended by Circular No. 1962. See Information Sheet attached.

Edward Woozley
Director

Attachment

DISTRIBUTION:
Mr. Frank M. Darrow (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No.1
BF

In reply refer to:

Los Angeles 0136832
0136834
0138347
0138348
0139085
0139268
0139269
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 2, 1957

Certified Mail
Return Receipt Requested

DECISION

Hoyt Rodney Gale :
Fred M. Rolens : Sodium Prospecting Permits
Margaret Smith Rolens :
David McGowan Rolens :
Junerose R. Rolens :

Manager's Decisions Affirmed

The above-named individuals have appealed to the Director, Bureau of Land Management, from decisions 1/ of the Manager, Land Office, Los Angeles, California, rejecting their respective applications for sodium prospecting permits, filed pursuant to sections 23, 24 and 25 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., secs. 261-263). The appeals are taken to the extent the respective applications were rejected for the reason the lands applied for are within the boundaries of the Death Valley National Monument, and are therefore not subject to sodium prospecting (43 CFR 191.2).

The appellants contend that the head of the agency having control of the Death Valley National Monument should be called upon, pursuant to 43 CFR 195.7, for a report as to whether there is any objection to the granting of sodium prospecting permits for the lands involved.

The appellants appear to be of the belief that if no objection is raised by the Director, National Park Service, permits may be granted. However, this is not so and the regulations contained in 43 CFR 195.7 are not applicable in the factual situation here involved.

1/ Applications 0136832 and 0136834 were rejected by decisions dated November 30, 1955; applications 0138347 and 0138348, by decisions dated February 13, 1956; application 0139085, by decision dated May 10, 1956; application 0139268, by decision dated May 18, 1956; and application 0139269, by decision dated November 1, 1956.

Section 1 of the Mineral Leasing Act, as amended (30 U.S.C., sec. 181), provides in pertinent part as follows:

> "Deposits of *** sodium, *** and lands containing such deposits owned by the United States, *** excluding lands *** in national parks and monuments, *** shall be subject to disposition *** ". (Underscoring supplied.)

In consonance therewith, Departmental regulations contained in 43 CFR 191.2(a)(1) provide that the Mineral Leasing Act does not apply to lands situated in national parks and monuments. Therefore, it being shown that the lands involved are within the Death Valley National Monument, the Manager's rejections of the applications to this extent are affirmed.

The Mrs. Rolens and Messrs. Gale and Rolens are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee in each case in which favorable action is sought. Each appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

If no appeal is taken herefrom, this decision will become final 30 days from notice hereof upon the appellants. In that event the case records will be returned, through the State Supervisor for this Bureau in California, and applications Los Angeles 0136832 and 0136834 will be in line for further processing to the extent they involve lands which are not situated within the Death Valley National Monument and as to which their applications require further processing.

Acting Director

Attachment

DISTRIBUTION:
Mr. Hoyt Rodney Gale (Certified Mail)
Mr. Fred M. Rolens (Certified Mail); Mrs. Margaret Smith Rolens (Certified);
Mr. David McGowan Rolens (Certified Mail); Mrs. Junerose R. Rolens(Certified)
Minerals Staff Officer (5); Geol. Survey (21); Mr. John Sieker, F.S.,
U. S. Dept. of Agriculture (8); Each Case File; Appeals List No. 1; BF.

In reply refer to:
Contest No. 6780
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 10, 1958

Certified Mail
Return Receipt Requested

DECISION

United States Contestant	Contest No. 6780 involving U-Granite Placer Claims Nos. 8 through 12 inclusive, situated in Lots 1 and 4, Sec. 4, T. 1 N., R. 5 W., and Lot 3, Sec. 33, T. 2 N., R. 5 W., S.B.M., California
v.	
Edward J. Soehnel Contestee	

Decision Affirmed

Edward J. Soehnel has appealed from the decision of the Hearing Examiner, dated June 20, 1957, which declared the subject mining claims to be null and void.

Adverse proceedings were initiated against the claims by the United States Forest Service on grounds that (1) The land is nonmineral in character, and (2) No discovery of mineral has been made. The contestant at the hearing withdrew a third charge asserted against the U-Granite No. 11, and the contestee abandoned all interest in U-Granite No. 12.

The Hearing Examiner found, after considering all of the evidence presented at the hearing, that there had not been a discovery of a valuable mineral deposit within the meaning of the mining laws and accordingly that the controverted claims were null and void. The Hearing Examiner's findings were based on the fact that no present actual market for the deposits in issue had been shown. He held that even though the subject material (decomposed granite) could be sold in isolated circumstances it was not established by the evidence that there was a present actual demand for it.

In the Hearing Examiner's decision the pertinent principles and authorities pertaining to the issue herein presented were briefly outlined as follows:

> "The mining laws insofar as they pertain to the issue raised at the hearing provided that: "valuable mineral deposits" in lands belonging to the United States are open to location and purchase

(30 U.S.C., 22) but that "no location of a mining claim shall be made until the discovery" of a valuable mineral is made within the limits of the claim (30 U.S.C. 23). In determining the sufficiency of a discovery to satisfy these laws the Department has long followed the rule that minerals must be found in sufficient quantity and quality to justify the expenditure of time and means by a prudent man in an effort to develop a valuable mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313, 322 (1905); Cameron v. United States, 252 U.S. 450, 459 (1920).

"In applying this principle to deposits similar to the deposits in issue, the Department has held that a showing must be made that the deposits can be removed and marketed at a profit. Opinion of Acting Solicitor 54 I.D. 294 (1933); Layman v. Ellis, 52 I.D. 714 (1929). This rule was summarized by the Department in United States v. Strauss, et al., 59 I.D. 129 (1945) at Page 138, as follows: "Gypsum, clay, limestone, and other kinds of stone here involved have been held to be minerals. W. H. Hooper 1 L.D. 560 (1881); Alldritt v. Northern Pacific R. R. Co., 25 L.D. 349 (1897); United States v. Barngrover et al., 57 I.D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are valuable mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, held to depend upon the marketability of the deposit. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. Ickes v. Underwood et al., 78 App. D.C. 396, 141 F. (2d) 546 (1944); Opinion of Acting Solicitor, 54 I.D. 294 (1933); Layman v. Ellis, 52 L.D. 714 (1929)."

"Since the claims are situated in a National Forest, the evidence sustaining the validity of the mineral locations must be clear and unequivocal. United States v. Dawson, 58 I.D. 670 (1944); Cf. United States v. Langmade and Mistler, 52 L.D. 700 (1929)."

The issues as seen by the Hearing Examiner and his findings of fact are amply supported by the record before us. The contestee has not shown that there is a present actual market of any consequence for the material found in the subject mining claims. In the case of United States v. George W. Black, 64 I.D. 93 (1957), it was held in deciding the validity of claims located for sandstone of widespread occurrence that, "In the absence of any serious dispute that the claims contain sandstone in sufficient quantity and of a quality at least suitable for use in constructing houses, their validity must, in the first instance, rest upon the marketability of the deposit. This factor, in turn, depends upon the existence of a present demand for the sandstone and its proximity to market." See also *United States* v. *Everett Foster et al.*, 65 I.D. 1 (1958). The argument made by the contestee that all the necessary elements of discovery are present in the contested claims is not valid when considered in light of the above-cited cases and the weight of evidence at the hearing.

No other issue need be considered in this appeal since in the absence of marketability the deposits here considered are not valuable mineral deposits within the meaning of the mining laws.

The evidence supports the Hearing Examiner's finding that there is no actual present demand for the material on the claims in question and accordingly his decision declaring U-Granite Placer claim 8 through 12 null and void is affirmed.

Edward J. Soehnel is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Soehnel, then the adverse party to be served is:

Mr. Charles F. Lawrence
Office of the General Counsel
United States Department of Agriculture
216 Federal Building
San Francisco 4, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Mr. Charles F. Lawrence (Certified Mail)
Mr. Donald J. Dunne, Attorney at Law (Certified Mail)
Mr. Edward J. Soehnel (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
Hearings Administrative Officer
Hearings Officer
GRH

45092

In reply refer to:

Contest No. 5124
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 13, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant :
vs. : Mineral Contest
Francis N. Dlouhy, et al., :
Contestees

Decision of Manager Declaring Mining Claims Invalid Affirmed

Francis N. Dlouhy has appealed, on his own behalf and on behalf of his co-locators, to the Director, Bureau of Land Management from a decision dated November 2, 1954, of the Manager, Land Office, Sacramento, California, holding invalid the Black Rock, Christopher D., King Snake, and Francis N. placer mining claims, and the Mistletoe Butte lode mining claim in secs. 11, 12, 13, 14 and 23; T. 16 S., R. 28 E., M.D.M., Tulare County, California. The claims are located along the North Fork of the Kaweah River, and they border on the west boundary of Sequoia National Park. Adverse proceedings had been ordered against the above-identified mining claims pursuant to a notice of charges asserted against the claims, contained in the Regional Administrator's memorandum to the Land Office under date of May 18, 1951, which alleged as follows:

> (1) That the land embraced within the claims is non-mineral in character.
>
> (2) That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

A hearing was held before the Manager of the Sacramento Land Office on May 7, 1954. Robert T. Felton, Assistant Regional Counsel, represented the United States. Mr. Dlouhy appeared in person and presented his own case. He was not represented by counsel. Mr. Val Payne, Mining Engineer of the Bureau of Land Management, and Mr. Dlouhy were the only witnesses called to testify at the hearing.

In his testimony Mr. Dlouhy stated he wished to abandon the Black Rock placer claim (T-4). This was accepted by the Manager in his decision and is not involved in the appeal.

In his appeal Mr. Dlouhy contends that the Manager erred in his appraisal of the testimony and evidence presented at the hearing, as to the other claims, and he avers that there is ample evidence of the mineral character of the lands, that the minerals are in sufficient quantity to constitute a valid discovery, and that the other factors used in establishing validity of mining claims, including accessibility, development, proximity to market, and existence of demand, are all sufficiently present in this case to afford ample predicate for finding that these claims are valid.

The record shows Mr. Dlouhy, testifying for the Government, stated that his original location of the Christopher D. was made on the basis of detritus such as sand and placer sand (T-4); the King Snake on the basis of sand and gravel (T-5); the Francis N. on the basis of sand (T-6); and the Mistletoe Butte lode on the basis of a lode of high grade limestone (T-6). Work on all of the claims appears to have been limited to exploratory excavations, taking of samples, having assays made and conducting surveys. A cabin has been erected on the Francis N. claim, and some work has been done in preparing for an approach to an intended bridge crossing on the Mistletoe Butte lode claim. (T-6 to 8). No actual mining has been done on any of the claims. (T-60).

Mr. Payne testified that he examined each of the mining claims (T-10) on February 20 and 21 and March 15, 1951 (T-13). He stated that the sand and gravel along the river channel is too rough and bouldery and too far from any market to justify any possible development. The limestone in their area, he stated, is a high calcium limestone but the claims are too far from any market and too inaccessible for possible development (T-21). He pointed out in cross-examination that there are numerous limestone deposits more readily accessible to the market areas of California (T-29). He expressed his opinion that the lands are non-mineral in character.

Mr. Dlouhy testified in his own behalf and offered a number of exhibits in evidence. His testimony established there is limestone on the claims of high calcium content and that there are traces of several elements, including gold, silver, and certain radioactive minerals to be found therein.

In addition to his testimony Mr. Dlouhy has submitted a number of ex parte documents in support of his locations both before and after the hearing. These present substantially the same type of data given at the hearing including additional assays showing traces of many minerals. They also purport to show that a potential market exists for the limestone in these claims.

The existence of sand, gravel, and limestone on these claims will be treated subsequently. The evidence is indisputable, however, that no other minerals have been found in any more than trace amounts, and that these are insufficient to support a mining location and to justify a prudent man in further expenditure of time and money to develop a paying mine. Iron Silver Mining Company v. Mike & Starr Gold and Silver Mining Co., 143 U.S. 394, 412 (1892); Chrisman v. Miller, 197 U. S. 313, 323 (1905); United States v. Frank J. Miller, 59 I.D. 446 (1947)

As to the value of the claim for sand and gravel deposits, the measure to be applied has been defined by the Department in the case of Layman v. Ellis, 52 I.D. 714 (1929) to be whether the deposits can be removed and marketed at a profit, and in an opinion of the Acting Solicitor, 54 I.D. 294 (1933), wherein it was stated: "* * * that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." The same test of value as a marketable commodity is applicable to the alleged valuable deposits of limestone upon the claim. Gray Trust Company, 47 L.D. 18 (1919).

There has been no evidence whatever of any marketable value in the sand and gravel deposits on this claim, although in his Answer to the charges Mr. Dlouhy suggests these materials might have value in processing or mixing with other high grade calcium content materials in the area. This value is purely conjectural, however, and fails to furnish any predicate on which to establish the validity of the claim as set out in the citations above.

There remains the necessity of determining if the limestone deposits on these claims have any value within the contemplation of the mining laws. In Big Pine Mining Corporation, 53 L.D. 410, 412 (1931), the Department stated (syllabus):

> "Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law."

See also case of United States v. C. E. Strauss, et al., 59 I. D. 129 (1945), which reads, in part, as follows:

> "Gypsum, clay, limestone, and the other kinds of stone here involved have been held to be minerals. W. H. Hooper, 1 L. D. 560 (1881); Alldritt v. Northern Pac. R.R. Co., 25 L.D. 349 (1897); U. S. v. Barngrover et al., 57 I.D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are valuable mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, held to depend upon the marketability of the deposit. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. Ickes v. Underwood et al., 78 App. D. C. 396, 141 F. (2d) 546 (1944); Layman v. Ellis, 52 L. D. 714 (1929)."

In the instant case the mining claimant has not conducted any quarrying operations on limestone. None has been transported to market, or offered for sale. Mr. Dlouhy has stated that he received replies to inquiries he made of several corporations in which he is a stockholder, which show the present-day uses of limestone in the steel, cement, and sugar beet industries. All are general statements, however, and there is nowhere any indication that the limestone in these claims can be mined, removed, and disposed of at a profit. The ruggedness of the terrain on these claims is admitted by all parties. Access is limited to a county road which also serves as an entrance to Sequoia National Park. The nearest railhead is approximately 20 miles distant, and other deposits of limestone have been shown to exist in considerable quantities under more accessible conditions, and nearer to actual markets. The showings of the contestee are based wholly on a conjectural market and are too general to refute the findings of the Government mineral examiner that there has been no discovery of valuable mineral within the meaning of the mining laws.

With respect to the burden of proof in the proceedings, the contestant has the burden of proving the charges with sufficient evidence to make a prima facie case, and thereupon it is incumbent upon the contestees to refute the charges by a preponderance of the evidence. Estate of Victor E. Hanny, A-26280 (March 5, 1952); Marshall D. Draper, et al., A-25800 (April 19, 1950); United States v. M. W. Mouat, et al., 60 I.D. 280 (January 27, 1949); United States v. Strauss, et al., supra.

The Manager's appraisal of the testimony at the hearing appears to be substantially in accord with the criteria which are recited above as the proper bases for determining the validity of the claims. It is evident from the hearings record that there have been no valid discoveries. The evidence presented by the contestant, assembled as the result of several examinations of the claims by a qualified mineral examiner, has established that there have not been adequate mineral discoveries on the claims within the meaning of the mining laws of the United States, and the contestee has not offset this showing by any clear or convincing showing of the mineral value of the claims. At the most the record shows only traces of gold, silver and other metallics and no actual commercial value of non-metalliferous minerals.

Accordingly, the decision of the Manager declaring these claims to be null and void is affirmed.

The parties in interest are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each separate mining claim in respect to which favorable action is sought. An appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

In the event appeal is taken by Francis N. Dlouhy et al., then they must serve a copy of all documents on the Regional Solicitor, Department of the Interior, P.O. Box 4291-TC, Sacramento 21, California, within 15 days after filing the document and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

DISTRIBUTION: Page 6

DISTRIBUTION:

Contestees c/o Francis N. Dlouhy (7 copies, Certified Mail)
Regional Solicitor (Sacramento)
Hearing Examiner (Sacramento)
Hearings Administrative Officer
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, USFS, Dept. of Agriculture (8)
Appeals List No. 1
VJR

appeal to Sec.

In reply refer to:

Los Angeles 060543
5.04g

Dismissed A-27474 6-23-58

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 13, 1958

Certified Mail
Return Receipt Requested

DECISION

Muroc Land Company	:	Sodium Prospecting Permit Application

Manager's Decision Affirmed

The Muroc Land Company has appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Los Angeles, California, dated March 21, 1955, rejecting its sodium prospecting permit application, filed pursuant to the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., secs. 261-262). The application was rejected for the reason that the land applied for had already been leased for sodium mining to Harvey S. Mudd, et al., pursuant to their high bid for the lease which was offered for the lands, at the sale, notice of which was duly published and posted.

The appellant filed its application for a sodium permit (lease) on December 27, 1945. Because it had on that same date filed application to locate the identical land by virtue of its ownership of Valentine Scrip, its sodium application was suspended. On April 1, 1947, after its scrip application was rejected, the appellant was informed that "Offering of the described land for lease by competitive bidding is under consideration." No further correspondence was received from the appellant until receipt of its notice of appeal.

The appellant alleges that the lands applied for were not classified as known mineral lands when it filed its application and that it acquired a vested right to a permit or lease by virtue of its filing. It alleges that rejection of its application nine years later and after lease of the lands to another is arbitrary and an abuse of discretion and constitutes a taking of property without due process of law. The appellant requests a hearing on the issues raised in its appeal.

With respect to the requested hearing, the pertinent Departmental regulation (43 CFR 221.6), 1/ provides as follows:

> "Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned *** for such a hearing. *** The allowance of a request for hearing is within the discretion of the Director ***."

Since the factual data necessary to properly determine the issues involved in this appeal are based upon matters of official record, the appellant's request for a hearing is denied. Cf. R. J. Walter, et al., A-27243 (March 15, 1956).

Section 23 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1952 ed., 261), authorizes the Secretary to grant prospecting permits for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium for a period of not exceeding 2 years, under such rules and regulations as he may prescribe. Section 24 of the act (30 U.S.C., 1952 ed., 262) confers upon a permittee a preference right to a lease, upon a showing satisfactory to the Secretary that valuable deposits of one of the enumerated substances has been discovered by the permittee on the land, or any part thereof, embraced in the permit, and that such land is chiefly valuable therefor. Under Section 24 of the act cited, lands known to contain valuable deposits of sodium and not covered by permits or leases "shall be held subject to lease."

The regulations promulgated by the Secretary, in accordance with the above act, are contained in 43 CFR Part 195. Section 195.12 thereof provides in pertinent part that "A permittee who discovers valuable sodium deposits in the land before the permit expires is entitled to a preference right lease of all or part of the lands in the permit ***." However, sodium lands, or lands reported by the Geological Survey to contain valuable deposits of that mineral may be leased only on a competitive basis. 43 CFR 195.17; William A. Myatt, 59 I. D. 204 (1946).

An applicant for a permit or lease, the issuance of which is discretionary with the Department, acquires no property or vested right in the lands covered by his application by the mere filing of that application. Cf. D. E. Jenkins, 55 I. D. 13, citing United States v. Wilbur, 283 U. S. 414. Nor would one who applies for a prospecting

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1/ The Departmental rules of practice were completely revised effective May 1, 1956 (43 CFR Part 221; Circular 1950, 21 F. R. (1860), and were further amended effective October 4, 1956 (Circular No. 1962 (21 F. R. 7623).

permit be entitled thereto, if in fact, the lands are valuable for the sodium therein contained. William A. Myatt, supra.

In United States v. U. S. Borax Company, 58 I.D. 426 (1943), the Department held that the lands here involved were known to be valuable for sodium as of 1927. Since they are of known value for sodium, if the lands are to be leased at all, they must be leased by competitive bidding only and a prospecting permit application for such lands is properly rejected.

Accordingly, the Manager's decision is affirmed.

Muroc Land Company is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washinton 25. D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950, as amended by Circular No. 1962. See Information Sheet attached.

If appeal is taken by the Muroc Land Company then it must serve a copy of all documents on the adverse party, Harvey S. Mudd, et al., 1206 Pacific Mutual Building, Los Angeles, California (Los Angeles 0118629), within 15 days after filing the document, and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

(Distribution - page 4)

DISTRIBUTION:

Mr. Girard F. Baker, Attorney at Law (Certified Mail)
Muroc Land Company (Regular Mail); Harvey S. Mudd, et al. (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (10)
Chief, Branch of Mining
Conservation Division
Appeals List No. 1
BF

appeal to Sec
affirmed A-27668 9/24/58

In reply refer to:

Contest No. 5124
(Sacramento)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 13, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant :
vs. : Mineral Contest
Francis N. Dlouhy, et al., :
Contestees

Decision of Manager Declaring Mining Claims Invalid Affirmed

Francis N. Dlouhy has appealed, on his own behalf and on behalf of his co-locators, to the Director, Bureau of Land Management from a decision dated November 2, 1954, of the Manager, Land Office, Sacramento, California, holding invalid the Black Rock, Christopher D., King Snake, and Francis N. placer mining claims, and the Mistletoe Butte lode mining claim in secs. 11, 12, 13, 14 and 23; T. 16 S., R. 28 E., M.D.M., Tulare County, California. The claims are located along the North Fork of the Kaweah River, and they border on the west boundary of Sequoia National Park. Adverse proceedings had been ordered against the above-identified mining claims pursuant to a notice of charges asserted against the claims, contained in the Regional Administrator's memorandum to the Land Office under date of May 18, 1951, which alleged as follows:

(1) That the land embraced within the claims is non-mineral in character.

(2) That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

A hearing was held before the Manager of the Sacramento Land Office on May 7, 1954. Robert T. Felton, Assistant Regional Counsel, represented the United States. Mr. Dlouhy appeared in person and presented his own case. He was not represented by counsel. Mr. Val Payne, Mining Engineer of the Bureau of Land Management, and Mr. Dlouhy were the only witnesses called to testify at the hearing.

In his testimony Mr. Dlouhy stated he wished to abandon the Black Rock placer claim (T-4). This was accepted by the Manager in his decision and is not involved in the appeal.

In his appeal Mr. Dlouhy contends that the Manager erred in his appraisal of the testimony and evidence presented at the hearing, as to the other claims, and he avers that there is ample evidence of the mineral character of the lands, that the minerals are in sufficient quantity to constitute a valid discovery, and that the other factors used in establishing validity of mining claims, including accessibility, development, proximity to market, and existence of demand, are all sufficiently present in this case to afford ample predicate for finding that these claims are valid.

The record shows Mr. Dlouhy, testifying for the Government, stated that his original location of the Christopher D. was made on the basis of detritus such as sand and placer sand (T-4); the King Snake on the basis of sand and gravel (T-5); the Francis N. on the basis of sand (T-6); and the Mistletoe Butte lode on the basis of a lode of high grade limestone (T-6). Work on all of the claims appears to have been limited to exploratory excavations, taking of samples, having assays made and conducting surveys. A cabin has been erected on the Francis N. claim, and some work has been done in preparing for an approach to an intended bridge crossing on the Mistletoe Butte lode claim. (T-6 to 8). No actual mining has been done on any of the claims (T-60).

Mr. Payne testified that he examined each of the mining claims (T-10) on February 20 and 21 and March 15, 1951 (T-13). He stated that the sand and gravel along the river channel is too rough and bouldery and too far from any market to justify any possible development. The limestone in their area, he stated, is a high calcium limestone but the claims are too far from any market and too inaccessible for possible development (T-21). He pointed out in cross-examination that there are numerous limestone deposits more readily accessible to the market areas of California (T-29). He expressed his opinion that the lands are non-mineral in character.

Mr. Dlouhy testified in his own behalf and offered a number of exhibits in evidence. His testimony established there is limestone on the claims of high calcium content and that there are traces of several elements, including gold, silver, and certain radioactive minerals to be found therein.

In addition to his testimony Mr. Dlouhy has submitted a number of ex parte documents in support of his locations both before and after the hearing. These present substantially the same type of data given at the hearing including additional assays showing traces of many minerals. They also purport to show that a potential market exists for the limestone in these claims.

The existence of sand, gravel, and limestone on these claims will be treated subsequently. The evidence is indisputable, however, that no other minerals have been found in any more than trace amounts, and that these are insufficient to support a mining location and to justify a prudent man in further expenditure of time and money to develop a paying mine. Iron Silver Mining Company v. Mike & Starr Gold and Silver Mining Co., 143 U.S. 394, 412 (1892); Chrisman v. Miller, 197 U. S. 313, 323 (1905); United States v. Frank J. Miller, 59 I.D. 446 (1947)

As to the value of the claim for sand and gravel deposits, the measure to be applied has been defined by the Department in the case of Layman v. Ellis, 52 I.D. 714 (1929) to be whether the deposits can be removed and marketed at a profit, and in an opinion of the Acting Solicitor, 54 I.D. 294 (1933), wherein it was stated: "* * * that the mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." The same test of value as a marketable commodity is applicable to the alleged valuable deposits of limestone upon the claim. Gray Trust Company, 47 L.D. 18 (1919).

There has been no evidence whatever of any marketable value in the sand and gravel deposits on this claim, although in his Answer to the charges Mr. Dlouhy suggests these materials might have value in processing or mixing with other high grade calcium content materials in the area. This value is purely conjectural, however, and fails to furnish any predicate on which to establish the validity of the claim as set out in the citations above.

There remains the necessity of determining if the limestone deposits on these claims have any value within the contemplation of the mining laws. In Big Pine Mining Corporation, 53 L.D. 410, 412 (1931), the Department stated (syllabus):

> "Lands containing limestone or other minerals, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law."

See also case of United States v. C. E. Strauss, et al., 59 I. D. 129 (1945), which reads, in part, as follows:

> "Gypsum, clay, limestone, and the other kinds of stone here involved have been held to be minerals. W. H. Hooper, 1 L. D. 560 (1881); Alldritt v. Northern Pac. R.R. Co., 25 L.D. 349 (1897); U. S. v. Barngrover et al., 57 I.D. 533 (1942). But whether particular deposits of these and other mineral substances of wide occurrence are valuable mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, held to depend upon the marketability of the deposit. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. Ickes v. Underwood et al., 78 App. D. C. 396, 141 F. (2d) 546 (1944); Layman v. Ellis, 52 L. D. 714 (1929)."

In the instant case the mining claimant has not conducted any quarrying operations on limestone. None has been transported to market, or offered for sale. Mr. Dlouhy has stated that he received replies to inquiries he made of several corporations in which he is a stockholder, which show the present-day uses of limestone in the steel, cement, and sugar beet industries. All are general statements, however, and there is nowhere any indication that the limestone in these claims can be mined, removed, and disposed of at a profit. The ruggedness of the terrain on these claims is admitted by all parties. Access is limited to a county road which also serves as an entrance to Sequoia National Park. The nearest railhead is approximately 20 miles distant, and other deposits of limestone have been shown to exist in considerable quantities under more accessible conditions, and nearer to actual markets. The showings of the contestee are based wholly on a conjectural market and are too general to refute the findings of the Government mineral examiner that there has been no discovery of valuable mineral within the meaning of the mining laws.

With respect to the burden of proof in the proceedings, the contestant has the burden of proving the charges with sufficient evidence to make a prima facie case, and thereupon it is incumbent upon the contestees to refute the charges by a preponderance of the evidence. Estate of Victor E. Hanny, A-26280 (March 5, 1952); Marshall D. Draper, et al., A-25800 (April 19, 1950); United States v. M. W. Mouat, et al., 60 I.D. 280 (January 27, 1949); United States v. Strauss, et al., supra.

The Manager's appraisal of the testimony at the hearing appears to be substantially in accord with the criteria which are recited above as the proper bases for determining the validity of the claims. It is evident from the hearings record that there have been no valid discoveries. The evidence presented by the contestant, assembled as the result of several examinations of the claims by a qualified mineral examiner, has established that there have not been adequate mineral discoveries on the claims within the meaning of the mining laws of the United States, and the contestee has not offset this showing by any clear or convincing showing of the mineral value of the claims. At the most the record shows only traces of gold, silver and other metallics and no actual commercial value of non-metalliferous minerals.

Accordingly, the decision of the Manager declaring these claims to be null and void is affirmed.

The parties in interest are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each separate mining claim in respect to which favorable action is sought. An appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

In the event appeal is taken by Francis N. Dlouhy et al., then they must serve a copy of all documents on the Regional Solicitor, Department of the Interior, P.O. Box 4291-TC, Sacramento 21, California, within 15 days after filing the document and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

DISTRIBUTION: Page 6

DISTRIBUTION:

Contestees c/o Francis N. Dlouhy (7 copies, Certified Mail)
Regional Solicitor (Sacramento)
Hearing Examiner (Sacramento)
Hearings Administrative Officer
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, USFS, Dept. of Agriculture (8)
Appeals List No. 1
VJR

In reply refer to:

Contest No. 5193
(Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 11, 1958

Certified Mail
Return Receipt Requested

DECISION

United States (Forest Service), Contestant v. Mrs. Alice Sophia Owsley (Successor in Interest of John C. Owsley, Deceased), Contestee	:	Involving Sacramento 045294, Application for Patent to Last Hope No. 1 lode mining claim and Last Hope No. 1 Mill Site, situate in sec. 24, T. 4 S., R. 18 E., and secs. 19 and 31, T. 4 S., R. 19 E., M.D.M., California.

Decision of Manager Affirmed

Mrs. Alice Sophia Owsley has appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Sacramento, California, dated January 21, 1954, rejecting an application for patent for the Last Hope No. 1 lode mining claim and the Last Hope No. 1 Mill Site, M. S. 6461 A and B, on which an application for patent had been filed October 19, 1951, by John C. Owsley, deceased husband of the appellant.

The Last Hope No. 1 lode mining claim was located September 5, 1939, and embraces 19.854 acres.

The Last Hope No. 1 Mill Site, located March 1, 1946, embraces 4.943 acres and lies about one mile southeast of the lode claim. All of the mill site and all but a small portion of the lode claim lie within the Stanislaus National Forest.

Final certificate was issued June 18, 1952, and contained a stipulation that patent, if and when issued, would contain a notation that as to those lands lying in SE$\frac{1}{4}$SE$\frac{1}{4}$ sec. 24, T. 4 S., R. 19 E., M.D.M., the patent would be subject to stockraising homestead entry Hd. 013758, previously patented, with minerals reserved to the United States, under the act of December 29, 1916 (39 Stat. 862).

By letter received April 6, 1953, the Regional Forester protested issuance of patent to the mining and mill site claims, alleging:

(1) The land covered by the lode claim is non-mineral in character;

(2) No discovery of a vein or lode has been made within the boundaries of the lode claim, and

(3) Application for patent to the mill site is not made in good faith for mining or milling purposes. Most of the land and improvements within the mill site are owned by someone other than the applicant and are presently being used for purposes unrelated to mining or milling.

A hearing on these charges was held before the Manager on September 25, 1953. Upon motion of the contestant's attorney, the testimony of Robert J. Smart, Field Examiner and Mining Engineer for the Bureau, was taken by deposition, at Los Angeles, California before United States Commissioner Howard V. Calverley, on October 30, 1953. In addition the Government offered the testimony of two other witnesses, Mining Engineer W. C. Sanborn and District Ranger James H. Michaels, both of the U.S. Forest Service. The appellant, Mrs. Alice Sophia Owsley, was the only witness for the contestee. The testimony of the parties at the hearing and deposition proceedings is summarized below. References to the transcript of the hearing are identified Tr. and references to the transcript of the deposition proceedings are identified Dp. Tr. Testimony in regard to the lode claim and the mill site is considered separately.

Mr. Smart testified that he examined the lode claim accompanied by the applicant (Dp. Tr. 4); that of four improvements listed by the applicant, only two were subject to examination because the other two improvements were nonexistent upon the ground, were caved, or could not be entered, and so it was impossible to ascertain whether or not they existed (Dp. Tr. 5). The two improvements examined consisted of a 20-foot cut with a small tunnel in back, estimated cost about $100, and a 140-foot trench which appeared to be a simple trench cut by a bulldozer through an old dump, estimated cost about $50 (Dp. Tr. 4 and 5). Mr. Smart further testified that the applicant pointed out his mineral showings, and at these points he (Smart) took samples (Dp. Tr. 4). He stated that two samples taken in the discovery cut were assayed and revealed 35 cents in gold and no silver (Tr. 5).

Mr. Sanborn stated that he examined the claims and took samples of vein material or possible mineralized structures in the various openings; that four of the samples assayed gold values from zero to $1.57 per ton, and that the fifth sample showed considerable gold content assaying at $16.10 per ton (Tr. 8-12) (Ex. #3). He stated that a composite assay of the five samples revealed $0.09 per ton, silver. (Tr. 12). Sanborn further stated that because of the high gold content in sample No. 5, he took five more samples in the vicinity of where he took the fifth sample to determine if it had any persistence but that assay reports on the additional samples revealed only traces of gold in two samples and gold values of $0.17, $1.05, and $1.75 per ton in the other three samples. A composite test of the five samples, run for silver, revealed no values for that metal (Tr. 13-16)(Ex. #5). Mr. Sanborn stated that the nature of the country is intermittently broken - no persistence of vein structure - with short lenses of quartz that are narrow and discontinuous (Tr. 17). He stated that it was his opinion, based on the samplings and the conditions of the ground that a prudent man would not be justified in spending his time and money to develop a paying mine (Tr. 16). He further stated that he believed that the vein structure would have to exceed $10 per ton on Last Hope No. 1 to approach the point at which a prudent man would be justified in spending his time and money.

The only witness to testify for the contestee was the widow of the deceased applicant, Mrs. Alice Sophia Owsley. She stated that her husband bought the mining claim for $500 before 1940 (Tr. 38), that some ore was mined and that samples were assayed which showed high gold value. Assay reports (Exhibits B and C), showing gold values up to $48.00 per ton of ore and $59.85 per ton of concentrates, were introduced by the contestee over the objection of the attorney for the Government. The basis of the objection was the failure of the contestee to lay the proper foundation for identifying the reports. There is nothing on the face of either assay report submitted by the contestee to show that the samples assayed were taken from the Last Hope No. 1 lode mining claim. Mrs. Owsley testified that the concentrate sample (Ex. C) was taken on the claim by her deceased husband but she was otherwise unable to identify any specific location (Tr. 44). Mrs. Owsley admitted that the assay report of three sample of ore (Ex. B) was found by her among her deceased husband's personal effects, but that she was unable to identify the report further (Tr. 46).

The regulations in effect at the time of the hearing, 43 CFR, 1949 ed., 221.38, provided "Objections to evidence will be duly noted, but not ruled upon, by the Manager, and such objections will be considered by the Director."

In E. L. Cord, dba. El Jiggs Ranch, 64 I.D. 232, the Department stated as follows:

> "The rule has long been settled that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941). The Administrative Procedure Act has made no change in this principle; thus the mere receipt in administrative proceeding of hearsay evidence is no cause for the reversal of an administrative order. Willapoint Oysters v. Ewing, 174 F. 2d 676, 690 (9th Cir. 1949) cert. den. 338 U.S. 860. Nor is the receipt of opinion and hearsay evidence a violation of due process. Hyun v. Landon, 219 F 2d. 404 (9th Cir. 1955).
>
> "However, although hearsay evidence is admissable under section 7(C) of the Administrative Procedure Act, it was held in the Willapoint Oysters case that administrative findings to be valid, 'cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla' (p. 691). The court said that this was precluded by the requirement in section 7(c) that findings must be ''supported by and in accordance with the reliable, probative, and substantial evidence.' Nonetheless the court stated that this requirement 'does not forbid administrative utilization of probative hearsay in making such findings' (p. 690)."

The two assay reports here in question not having been sufficiently identified to definitely connect them to the Last Hope No. 1 lode claim, they must be considered incompetent, unprobative hearsay and are not admissable as evidence. Cf. United States v. Northern Pacific Railway Co., 1 F. 2d 53, 57.

The contestee offered no other evidence to establish discovery except the two assay reports and since they are not admissable as evidence the only evidence from which determination can be made as to whether a valid discovery has been made is the evidence submitted by the witnesses of the Government.

In order to have a valid discovery on a claim, mineral must be found in such quantity and quality as would warrant a prudent man in the expenditure of his labor and means in an effort to develop a paying mine. Castle v. Womble, 19 L.D. 455; Chrisman v. Miller 197 U.S. 313, 323. The uncontroverted evidence presented by the Government's mining engineers based on an examination of the claims, the taking of samples, and the assaying thereof, reveals that the claim contains only low grade minerals insufficient in quality or quantity to meet the requirements for discovery under the mining laws.

Accordingly, it is found that there is not exposed, within the limits of this claim, sufficient evidence of mineral to constitute a valid discovery, and in the absence of discovery, the application for patent was properly rejected.

We turn now to consideration of the mill site. Mr. Smart testified by deposition that the mill site is about one mile south of the applicant's lode claim and is located within the Stanislaus National Forest (Dr. Tr. 6). He stated that he examined the site in the company of the applicant who lived on part of the ground, and that Mr. Albert F. Zurilgen also occupies part of the land (Dp. Tr. 6). Mr. Smart further testified as follows:

> "The applicant and Mr. Zurilgen had acquired title, or such title as they could acquire, from old placer claims located on the ground. These placer claims were known as the Pine Knoll Placer Claim and the Home Placer. Mr. Zurilgen purchased certain areas of these two old placer claims and proceeded to build about six small cabins on the land, and which he rented out to tourists and workers in the area. He finally realized that he could not acquire a good title to the land. In conjunction with Mr. Owsley he entered into an agreement to survey out the millsite claim, and upon which the half of said buildings are located, in an attempt to use the millsite in conjunction with the mining and receive a mining patent. In discussing these matters with Mr. Owsley, the mine applicant, and Mr. Zurilgen, it was brought out that Mr. Zurilgen was the man who was paying for the surveys upon the two claims and had entered into an agreement with the applicant to patent the land. This agreement made between the two men was not recorded. In return for getting a patent to the millsite claim, Mr. Zurilgen was to receive a grant deed from the mining claim and the fourth part of the land where his buildings were at and in turn Mr. Owsley would receive -- would have a good title to his acre in the south end of the millsite camp."

Mr. Sanborn, testifying for the Government, stated that Mr. Zurilgen occupies a cabin on the mill site; that Mr. Zurilgen owns several cabins on the site which he rents; that there is a sign on the mill site which states "Pine Knoll Cabins for Rent," and that there is a sign in front of one of the houses located on the site which states "For Rent."

Mr. Michaels, who testified for the Government, stated that Mr. Zurilgen occupies a cabin on the mill site; that there is a sign on the site which states "For Rent, Sale or Trade, Pine Knoll" and that there is a "For Rent" sign on the front of a house in the south area of the site.

Mrs. Owsley testified that her deceased husband bought the mill site in 1940 (Tr.38), thinking it was patented land (Tr. 39); that the mill was used in 1940 by the claimant to process ore from the claim (Tr. 40); that it was leased to Mr. Raymond Arndt in 1948 and used by him for two or three months to process ore from the claim (Tr. 41); and that it was used occasionally between 1940 and 1948 (Tr. 45), but has not been used since 1948 (Tr. 45). She further testified that Mr. Zurilgen owns a house and garage and four cabins located on the mill site (Tr. 47); that Mr. Zurilgen rented the house next to hers (Tr. 48); and that Mr. Zurilgen owns two houses and a cabin west of a road that bisects the site (Tr. 48). Mrs. Owsley further testified that Mr. Zurilgen owns the land within the mill site on which these buildings are located, (Tr. 47-48), and that she considers only the southern portion of the mill site to be her own (Tr. 49).

Mr. Smart in his testimony does not identify the source of all his information about Mr. Zurilgen's interest in this mill site. It would appear that at least part of the information was received from Mr. Owsley, the deceased claimant. That portion of the testimony is considered hearsay. As indicated earlier, however, in administrative proceedings, the strict common law rules of evidence do not apply and though an administrative finding cannot be based upon hearsay alone, it has been held that hearsay may serve to support a finding "at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence to which responsible persons are accustomed to rely in serious affairs." NLRB v. Remington Rand, 94 F. 2d 862, 873, cert. denied 304 U.S. 576 (1938). Here Mrs. Owsley has testified herself that Mr. Zurilgen and not she is the owner of most of the improvements on the mill site and that the only land she considers her own is the southerly portion of the mill site.

After a careful review of all the testimony introduced at the hearing, the conclusion is inescapable that even if the Government may not have proved conclusively by its own witnesses that most of the mill site is not used or occupied by the claimant for mining and milling purposes, the contestee herself gave testimony on direct examination and cross-examination which materially strengthens the Government's charge. It is axiomatic that evidence given by a defendant's witness may be considered against the defendant. Taking the testimony as a whole, it must be held that the weight of the evidence is that most of the lands in this mill site are not presently used or occupied by the claimant for mining or milling purposes.

The law on which this location is based (R.S. 2337, 30 U.S.C., 1952 ed., sec. 42) provides:

> "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site as provided in this section."

The evidence in this case strongly supports the finding that the reduction mill on this claim was built for use in connection with the Last Hope No. 1 lode mining claim. The two were embraced in the same application for patent. The claimant's right was therefore founded upon the first provision of R. S. 2337, permitting the location of a mill site as an adjunct to a lode claim. Where the locator of such a site ceases to be the proprietor of the vein or lode, the right to the associated mill site is also ended. Watterson et al. v. Cruse, 176 Pac.870, 871 (1918); 2 Lindley on Mines (3rd. Ed.) sec. 564.

However, even if the presence of the reduction mill on the site could bring the claim within the provisions of the second section of the law, there is nevertheless no basis for issuing patent therefor.

The lands in the mill site are located within a national forest, and it has been held that it is more imperative that there be required of one seeking a patent under a mill site location for lands within a national forest a clear and unequivocal showing that the location is for bona fide mining and milling purposes than would be necessary in instances of such location on the open public domain. United States v. Langmade and Mistler, 52 L.D. 700(1929). Conceding that the presence of a reduction mill on the site is a use intimately connected with mining and milling, yet its use appears to have been intermittent and slight. Moreover, the weight of evidence indicates that much of the land in the mill site is presently occupied by Mr. Zurilgen, who rents cabins thereon, and that if patent were issued, he would be one of the principal beneficiaries. It has been held that where the claimant's application for the mill site was not made in good faith for himself, he was not entitled to a patent thereto. Hamburg Mining Company v. Stephenson, 30 Pac. 1088 (1883). It follows that an application for a mill site substantially for the benefit of another, who is using the land for purposes not associated with mining and milling, must be rejected.

However, it should be pointed out that the Forest Service has limited its protest to the issuance of patent, and has not challenged the validity of the claims, per se. No evidence was adduced at the hearing of any other higher need or value for the lands here involved. Government witness Sanborn, testifying in cross-examination, stated that there was no marketable timber on the lode claim, and only an insignificant amount on the mill site (Tr. 30). Where a mineral applicant's right to patent is assailed in contest proceedings and no public interest or adverse claim is involved, it has been the practice of the Department to merely reject the application and cancel the entry, without making a determination of the validity of the claim or claims. Park Premier Mining Company, A-17692, May 23, 1936; United States v. Margherita Logomarcini, A-25448, October 24, 1949; Clipper Mining Company v. Eli Mining and Land Company, 194 U.S. 220 (1904).

While the mere cancellation of the application does not have the effect of a determination that the claimant has no valid possession under the mining law, neither does it imply or create the presumption that he has such possession. It leaves the question undetermined. Considering the showings of the claimant as to discovery on the lode claim and occupation and use of the mill site, the finding is justified that no patent should be issued. Park Premier Mining Company, supra.

Accordingly, the decision of the Manager rejecting the patent application and cancelling the entry for the Last Hope No. 1 lode mining claim and the Last Hope No. 1 mill site is affirmed.

Mrs. Alice Sophia Owsley is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each separate claim on which the appellant is seeking favorable action. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

If appeal is taken by Mrs. Owsley then she must serve a copy of all documents on the adverse party, Regional Forester, California Region, U.S. Forest Service, 630 Sansome Street, San Francisco 11, California, within 15 days after filing the document, and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

DISTRIBUTION:

Mr. Robert Owen Curran, Attorney at Law (Certified Mail)
Mrs. Alice Sophia Owsley, (Regular Mail)
Regional Forester, (Regular Mail)
Mr. John Sieker (8)
Geological Survey (3)
Appeals List No. 1
VJR

32292

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Regional Solicitor (Sacramento)
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Hearings Administrative Officer
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In reply refer to:

Contest No. 5193
(Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 11, 1958

Certified Mail
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DECISION

United States
(Forest Service), Contestant

v.

Mrs. Alice Sophia Owsley
(Successor in Interest of
John C. Owsley, Deceased),
Contestee

Involving Sacramento 045294,
Application for Patent to
Last Hope No. 1 lode mining
claim and Last Hope No. 1

Mill Site, situate in sec. 24,
T. 4 S., R. 18 E., and secs.
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Mrs. Alice Sophia Owsley has appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Sacramento, California, dated January 21, 1954, rejecting an application for patent for the Last Hope No. 1 lode mining claim and the Last Hope No. 1 Mill Site, M. S. 6461 A and B, on which an application for patent had been filed October 19, 1951, by John C. Owsley, deceased husband of the appellant.

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(2) No discovery of a vein or lode has been made within the boundaries of the lode claim, and

(3) Application for patent to the mill site is not made in good faith for mining or milling purposes. Most of the land and improvements within the mill site are owned by someone other than the applicant and are presently being used for purposes unrelated to mining or milling.

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The regulations in effect at the time of the hearing, 43 CFR, 1949 ed., 221.38, provided "Objections to evidence will be duly noted, but not ruled upon, by the Manager, and such objections will be considered by the Director."

In E. L. Cord, dba. El Jiggs Ranch, 64 I.D. 232, the Department stated as follows:

> "The rule has long been settled that the technical rules for the exclusion of evidence are not applicable to Federal administrative proceedings in the absence of a statutory requirement that such rules are to be observed. Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941). The Administrative Procedure Act has made no change in this principle; thus the mere receipt in administrative proceeding of hearsay evidence is no cause for the reversal of an administrative order. Willapoint Oysters v. Ewing, 174 F. 2d 676, 690 (9th Cir. 1949) cert. den. 338 U.S. 860. Nor is the receipt of opinion and hearsay evidence a violation of due process. Hyun v. Landon, 219 F 2d. 404 (9th Cir. 1955).
>
> "However, although hearsay evidence is admissable under section 7(C) of the Administrative Procedure Act, it was held in the Willapoint Oysters case that administrative findings to be valid, 'cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla' (p. 691). The court said that this was precluded by the requirement in section 7(c) that findings must be 'supported by and in accordance with the reliable, probative, and substantial evidence.' Nonetheless the court stated that this requirement 'does not forbid administrative utilization of probative hearsay in making such findings' (p. 690)."

The two assay reports here in question not having been sufficiently identified to definitely connect them to the Last Hope No. 1 lode claim, they must be considered incompetent, unprobative hearsay and are not admissable as evidence. Cf. United States v. Northern Pacific Railway Co., 1 F. 2d 53, 57.

The contestee offered no other evidence to establish discovery except the two assay reports and since they are not admissable as evidence the only evidence from which determination can be made as to whether a valid discovery has been made is the evidence submitted by the witnesses of the Government.

In order to have a valid discovery on a claim, mineral must be found in such quantity and quality as would warrant a prudent man in the expenditure of his labor and means in an effort to develop a paying mine. Castle v. Womble, 19 L.D. 455; Chrisman v. Miller 197 U.S. 313, 323. The uncontroverted evidence presented by the Government's mining engineers based on an examination of the claims, the taking of samples, and the assaying thereof, reveals that the claim contains only low grade minerals insufficient in quality or quantity to meet the requirements for discovery under the mining laws.

Accordingly, it is found that there is not exposed, within the limits of this claim, sufficient evidence of mineral to constitute a valid discovery, and in the absence of discovery, the application for patent was properly rejected.

We turn now to consideration of the mill site. Mr. Smart testified by deposition that the mill site is about one mile south of the applicant's lode claim and is located within the Stanislaus National Forest (Dr. Tr. 6). He stated that he examined the site in the company of the applicant who lived on part of the ground, and that Mr. Albert F. Zurilgen also occupies part of the land (Dp. Tr. 6). Mr. Smart further testified as follows:

> "The applicant and Mr. Zurilgen had acquired title, or such title as they could acquire, from old placer claims located on the ground. These placer claims were known as the Pine Knoll Placer Claim and the Home Placer. Mr. Zurilgen purchased certain areas of these two old placer claims and proceeded to build about six small cabins on the land, and which he rented out to tourists and workers in the area. He finally realized that he could not acquire a good title to the land. In conjunction with Mr. Owsley he entered into an agreement to survey out the millsite claim, and upon which the half of said buildings are located, in an attempt to use the millsite in conjunction with the mining and receive a mining patent. In discussing these matters with Mr. Owsley, the mine applicant, and Mr. Zurilgen, it was brought out that Mr. Zurilgen was the man who was paying for the surveys upon the two claims and had entered into an agreement with the applicant to patent the land. This agreement made between the two men was not recorded. In return for getting a patent to the millsite claim, Mr. Zurilgen was to receive a grant deed from the mining claim and the fourth part of the land where his buildings were at and in turn Mr. Owsley would receive -- would have a good title to his acre in the south end of the millsite camp."

Mr. Sanborn, testifying for the Government, stated that Mr. Zurilgen occupies a cabin on the mill site; that Mr. Zurilgen owns several cabins on the site which he rents; that there is a sign on the mill site which states "Pine Knoll Cabins for Rent," and that there is a sign in front of one of the houses located on the site which states "For Rent."

Mr. Michaels, who testified for the Government, stated that Mr. Zurilgen occupies a cabin on the mill site; that there is a sign on the site which states "For Rent, Sale or Trade, Pine Knoll" and that there is a "For Rent" sign on the front of a house in the south area of the site.

Mrs. Owsley testified that her deceased husband bought the mill site in 1940 (Tr.38), thinking it was patented land (Tr. 39); that the mill was used in 1940 by the claimant to process ore from the claim (Tr. 40); that it was leased to Mr. Raymond Arndt in 1948 and used by him for two or three months to process ore from the claim (Tr. 41); and that it was used occasionally between 1940 and 1948 (Tr. 45), but has not been used since 1948 (Tr. 45). She further testified that Mr. Zurilgen owns a house and garage and four cabins located on the mill site (Tr. 47); that Mr. Zurilgen rented the house next to hers (Tr. 48); and that Mr. Zurilgen owns two houses and a cabin west of a road that bisects the site (Tr. 48). Mrs. Owsley further testified that Mr. Zurilgen owns the land within the mill site on which these buildings are located, (Tr. 47-48), and that she considers only the southern portion of the mill site to be her own (Tr. 49).

Mr. Smart in his testimony does not identify the source of all his information about Mr. Zurilgen's interest in this mill site. It would appear that at least part of the information was received from Mr. Owsley, the deceased claimant. That portion of the testimony is considered hearsay. As indicated earlier, however, in administrative proceedings, the strict common law rules of evidence do not apply and though an administrative finding cannot be based upon hearsay alone, it has been held that hearsay may serve to support a finding "at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence to which responsible persons are accustomed to rely in serious affairs." NLRB v. Remington Rand, 94 F. 2d 862, 873, cert. denied 304 U.S. 576 (1938). Here Mrs. Owsley has testified herself that Mr. Zurilgen and not she is the owner of most of the improvements on the mill site and that the only land she considers her own is the southerly portion of the mill site.

After a careful review of all the testimony introduced at the hearing, the conclusion is inescapable that even if the Government may not have proved conclusively by its own witnesses that most of the mill site is not used or occupied by the claimant for mining and milling purposes, the contestee herself gave testimony on direct examination and cross-examination which materially strengthens the Government's charge. It is axiomatic that evidence given by a defendant's witness may be considered against the defendant. Taking the testimony as a whole, it must be held that the weight of the evidence is that most of the lands in this mill site are not presently used or occupied by the claimant for mining or milling purposes.

The law on which this location is based (R.S. 2337, 30 U.S.C., 1952 ed., sec. 42) provides:

> "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site as provided in this section."

The evidence in this case strongly supports the finding that the reduction mill on this claim was built for use in connection with the Last Hope No. 1 lode mining claim. The two were embraced in the same application for patent. The claimant's right was therefore founded upon the first provision of R. S. 2337, permitting the location of a mill site as an adjunct to a lode claim. Where the locator of such a site ceases to be the proprietor of the vein or lode, the right to the associated mill site is also ended. *Watterson et al.* v. *Cruse*, 176 Pac.870, 871 (1918); 2 Lindley on Mines (3rd. Ed.) sec. 564.

However, even if the presence of the reduction mill on the site could bring the claim within the provisions of the second section of the law, there is nevertheless no basis for issuing patent therefor.

The lands in the mill site are located within a national forest, and it has been held that it is more imperative that there be required of one seeking a patent under a mill site location for lands within a national forest a clear and unequivocal showing that the location is for bona fide mining and milling purposes than would be necessary in instances of such location on the open public domain. United States v. Langmade and Mistler, 52 L.D. 700(1929). Conceding that the presence of a reduction mill on the site is a use intimately connected with mining and milling, yet its use appears to have been intermittent and slight. Moreover, the weight of evidence indicates that much of the land in the mill site is presently occupied by Mr. Zurilgen, who rents cabins thereon, and that if patent were issued, he would be one of the principal beneficiaries. It has been held that where the claimant's application for the mill site was not made in good faith for himself, he was not entitled to a patent thereto. Hamburg Mining Company v. Stephenson, 30 Pac. 1088 (1883). It follows that an application for a mill site substantially for the benefit of another, who is using the land for purposes not associated with mining and milling, must be rejected.

However, it should be pointed out that the Forest Service has limited its protest to the issuance of patent, and has not challenged the validity of the claims, per se. No evidence was adduced at the hearing of any other higher need or value for the lands here involved. Government witness Sanborn, testifying in cross-examination, stated that there was no marketable timber on the lode claim, and only an insignificant amount on the mill site (Tr. 30). Where a mineral applicant's right to patent is assailed in contest proceedings and no public interest or adverse claim is involved, it has been the practice of the Department to merely reject the application and cancel the entry, without making a determination of the validity of the claim or claims. Park Premier Mining Company, A-17692, May 23, 1936; United States v. Margherita Logomarcini, A-25448, October 24, 1949; Clipper Mining Company v. Eli Mining and Land Company, 194 U.S. 220 (1904).

While the mere cancellation of the application does not have the effect of a determination that the claimant has no valid possession under the mining law, neither does it imply or create the presumption that he has such possession. It leaves the question undetermined. Considering the showings of the claimant as to discovery on the lode claim and occupation and use of the mill site, the finding is justified that no patent should be issued. Park Premier Mining Company, supra.

Accordingly, the decision of the Manager rejecting the patent application and cancelling the entry for the Last Hope No. 1 lode mining claim and the Last Hope No. 1 mill site is affirmed.

Mrs. Alice Sophia Owsley is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each separate claim on which the appellant is seeking favorable action. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

If appeal is taken by Mrs. Owsley then she must serve a copy of all documents on the adverse party, Regional Forester, California Region, U.S. Forest Service, 630 Sansome Street, San Francisco 11, California, within 15 days after filing the document, and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

DISTRIBUTION:

Mr. Robert Owen Curran, Attorney at Law (Certified Mail)
Mrs. Alice Sophia Owsley, (Regular Mail)
Regional Forester, (Regular Mail)
Mr. John Sieker (8)
Geological Survey (3)
Appeals List No. 1
VJR

32292

In reply refer to:

Sacramento 049229
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 11, 1958

DECISION

Patricia Lemoge Hudelson	:	Mineral Application

Withdrawal of Appeal
Appeal Dismissed
Case Remanded

On September 19, 1957, Mrs. Patricia Lemoge Hudelson, through her attorney, appealed to the Director, Bureau of Land Management, from so much of the decision of the Manager, Land Office, Sacramento, California, dated August 16, 1957, as rejected her mineral patent application, Sacramento 049229, to the extent of the Mixtlan and the Quigley Consolidated placer mining claims. The application was filed pursuant to R. S. Sec. 2325 (30 U.S.C., sec. 29).

The reason for the rejection of the Mixtlan claim was, among other things, that it embraced lands in the SE$\frac{1}{4}$ sec. 16, T. 22 N., R. 9 E., M.D.M., California, not subject to mining location as they are included in school grant lands managed and administered by the State of California. The basis for rejection of the Quigley claim was, among other things, that it embraced lands in the SE$\frac{1}{4}$ sec. 29 and the N$\frac{1}{2}$NW$\frac{1}{4}$NE$\frac{1}{4}$ sec. 32, T. 22 N., R. 9 E., M.D.M., California, which includes 180 acres and is in excess of the statutory limitation (30 U.S.C., sec. 36).

Counsel for the appellant has filed a withdrawal of the appeal as to both the Mixtlan and Quigley claims, and at the same time filed a withdrawal of the mineral patent application to the extent of the N$\frac{1}{2}$NW$\frac{1}{4}$NE$\frac{1}{4}$ sec. 32, above township and range, 20 acres within the Quigley placer claim. As a consequence, the appeal is dismissed.

The case is being remanded to the Land Office, through the Bureau's State Supervisor at Sacramento, California, for further appropriate action on the mineral patent application.

Edward Woozley
Director

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SO (California) with case record Sacramento 049229
Mr. Antonio C. Velasquez, Attorney for Appellant (Regular Mail)
Mrs. Patricia Lemoge Hudelson (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
WHW

In reply refer to:

Sacramento 052127
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 3, 1958

Certified Mail
Return Receipt Requested

DECISION

Ancho Erie Mining Co. : Application for Mineral Patent

Manager's Decision Modified and Affirmed

The Ancho Erie Mining Company filed application for mineral patent for the Tunnel Consolidated Lode Claim which included 26 separate and distinct mining locations. The Manager, Land Office, Sacramento, California, by decision dated February 19, 1957, rejected the application in part. In effect he declared 23 of the mining claims to be null and void, in whole or in part, to the extent indicated in his decision for the reasons that the lands involved were withdrawn from entry as a power site reserve prior to the locations of the claims and/or were embraced in lands patented to the Central Pacific Railway Co., on April 1, 1935 (inadvertently shown as April 11, 1935).

The mining claimant, through its attorney, has appealed to the Director, Bureau of Land Management, from that decision insofar as that decision related to the validity of the claims. It remitted the sum of $130 ($5.00 for each claim involved) as filing fees for the appeal. Since the rejection was directed to only 23 of the claims, the required filing fee was $115. The excess payment may be refunded to the appellant upon request therefor to the Manager, Land Office, Sacramento, California. Forms of application for such repayment may be obtained from the Land Office.

The appellant contends that section 24 of the Federal Power Act, as amended (16 U.S.C., 1952 ed., sec. 818) permits the patenting of mining claims "heretofore made" subject to the limitations and conditions of that section. The 1948 amendment to section 24 (62 Stat. 275) was quoted in support of this contention. The appellant offers the argument that since the lands have not yet been utilized for the purpose for which they were withdrawn, it would be equitable to now procure a lifting of that withdrawal, subject to the provisions of section 24, so as to validate and effectuate the previously located claims.

The following lands, among others, upon application of the Excelsior Water and Mining Co., filed July 25, 1921 as amended by application filed April 6, 1922, were "reserved from entry, location, or other disposal under the laws of the United States until otherwise directed" and were incorporated into Federal Power Reserve No. 237:

T. 18 N., R. 11 E., M.D.M., California
Sec. 16; SW¼, SW¼SE¼
Sec. 17; SE¼SE¼
Sec. 20; W½NE¼, SE¼NW¼, NE¼NE¼, SW¼NW¼, N½SW¼
Sec. 21; NE¼NW¼, NW¼NE¼

The record also reflects that the E½NE¼, NE¼SE¼, and lots 4, 5 and 6 of section 17, same township and range, were patented to the Central Pacific Railway Co., on April 11, 1935, without reservation of minerals to the United States. The lands embraced in each of the 23 claims are in whole or in part, embraced within the above-described withdrawn areas.

All the claims in the patent application were located subsequent to the effective dates of the withdrawals of the lands and prior to August 11, 1955.

Prior to the passage of the Act of August 11, 1955 (Public Law 359; 30 U.S.C., 1952 ed., Supp. IV, secs. 621-625), the Department frequently held that lands classified or reserved as power sites are not open to any form of disposition, including mining location for metalliferous minerals (except for the period as shown in footnote 1/ below), until the lands have been restored to entry pursuant to section 24 of the Federal Power Act, *supra*. Instructions 47 L.D. 595, 597; 43 CFR 103.1; *Harry A. Schultz et al.*, 61 I.D. 259 (1953); *United States* v. *Wilmot D. Everett et al.*, A-27010 (August 30, 1954). Mining locations made on lands withdrawn from such location are null and void. *Consolidated Mines and Smelting Co., Ltd.*, A-27019 (July 28, 1954); *United States* v. *Wilmot D. Everett,* supra. Therefore, the mining locations, having been made subsequent to the withdrawal and prior to August 11, 1955, are void insofar as they may conflict with such withdrawal. Nor would the lifting of that withdrawal validate the previously void locations. Further, lands entered and patented without mineral reservation are not subject to location under the United States mining laws, the mineral depositstherein not belonging to the United States.

1/ Except for the period from (Act of) June 25, 1910 (36 Stat 847) as amended by the act of August 24, 1912(37 Stat 497) to June 10, 1920 when section 24 of the Federal Power Act became effective.

The records shows the Grouse, Slosson, Reno, Massachusetts, Brown Bear, Wolf, Porcupine, Bishop, Squirrel, Oak and Cliff lode claims to be situated entirely within the areas described above as withdrawn or patented. Those claims are, therefore, null and void in their entirety.

The loss of discovery on a claim from any cause will defeat the validity of the claim. *Waskey v. Hammer*, 223 U.S. 85, 91 (1911); *Gwillim v. Donnellan*, 115 U.S. 45 (1885) *Lone Dana Lode and Mill Site* 10 L.D. 53 (1890). Therefore, it being shown that the point of discovery on the Quail, Raccoon, Coyote, Agate, Fern and Cedar lode claims is located within portions of the claims extending within the withdrawn area, those claims are null and void in their entirety.

The Commonwealth, Cambridge, Blue Jay, Eagle, Dogwood and Tunnel No. 1 lode claims are partially within and partially outside the withdrawn area. The discovery point in each of these claims is not within the withdrawn area. Therefore, these claims are invalid only to the extend of the lands within the withdrawn area.

Accordingly, the Manager's decision in regard to the above 23 enumerated claims, is affirmed.

The application for patent included the Cape Cod, Tunnel No. 2 and Tunnel No. 3 lode mining claims. Determination concerning the validity of those claims is in order at this time.

The Cape Cod is shown to be wholly within the NW$\frac{1}{4}$ sec. 16; Tunnel No. 3 is shown to overlap portions of the SE$\frac{1}{4}$ sec. 20 and the SW$\frac{1}{4}$ sec. 21. These claims are entirely outside the withdrawn areas; they are not invalid for conflict with the withdrawals. Tunnel No. 2 is within the E$\frac{1}{2}$NE$\frac{1}{4}$ sec. 20; the NE$\frac{1}{4}$NE$\frac{1}{4}$ sec. 20 was withdrawn and is included in the Federal power reserve above mentioned. The discovery point of that claim is shown to be in the SE$\frac{1}{4}$NE$\frac{1}{4}$ of section 20; therefore, to the extent that Tunnel No. 2 embraces lands within the power site withdrawal (NE$\frac{1}{4}$NE$\frac{1}{4}$ sec. 20), the claim is null and void.

It was pointed out by the Manager that the Mining Claims Restoration Act of August 11, 1955, permitted mining, development and utilization of public lands withdrawn or reserved for power development and other purposes. Although a mining location after the enactment of that act may not serve to validate a previously located invalid claim, it serves to permit a location notwithstanding the withdrawal, subject, of course, to the limitations of that act. This decision in no way prejudices the appellant's right to file if not otherwise barred for other reasons, new location notices for its claims and to pursue such claims to patent. Of course, appropriate action may be taken by the applicant to perfect its patent application to so many or such portions of the claims as not herein ruled invalid.

Ancho Erie Mining Co., is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each claim with respect to which favorable action is sought. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950, as amended by Circular No. 1962. See Information Sheet attached.

Edward Woozley
Director

Attachment

DISTRIBUTION:

Mr. Lynne Kelly, Attorney at Law (Certified Mail)
Cooley, Crowley, Gaither, Godward, Castro and Huddleson (Certified Mail)
Ancho Erie Mining Co. (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, Forest Service (8)
Appeals List No. 1
BF

In reply refer to:

Los Angeles 0136731
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 11, 1958

Certified Mail
Return Receipt Requested

DECISION

Frank A. Riehle, Jr.	:	Sodium Prospecting Permit Application

Manager's Decision Affirmed, as Modified; Case Remanded for Further Processing

Frank A. Riehle, Jr., has appealed to the Director, Bureau of Land Management, from a decision of the Manager, Land Office, Los Angeles, California, dated May 23, 1957, insofar as it rejected his application for a sodium prospecting permit (Los Angeles 0136731), filed under the provisions of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 261), because of conflict with similar application Los Angeles 0136851.

Riehle filed his application on November 18, 1955. That application embraced more than 2,560 acres but was subsequently amended to include less than the maximum acreage. The lands, here involved, were described by metes and bounds and further identified by subdivision (township and section) from a protraction of the legal survey on a when-surveyed basis. However, the beginning point of his description was not connected by courses and distances with a corner of the public land survey. The application, after request of the Land Office, was amended so as to connect with a corner of the public survey on February 27, 1957. The lands in issue, if surveyed, would be sections 22 and (fractional) 23, T. 30 S., R. 38 E., M.D.M., California.

Raymond Cecil Phillips, et al., filed application, Los Angeles 0136851, for a sodium prospecting permit on November 28, 1955. Insofar as is material to this discussion, it conflicted with the Riehle application on an "if surveyed" basis as to sec. 22 and the W$\frac{1}{2}$ sec. 23. The Phillips' description of the lands sought was tied to a corner of the survey. The Manager held that the Riehle application, for priority purposes, could be considered as filed only from the time the amended application, tying the description to a corner of the survey, was received. Therefore, he found that Phillips was entitled to a permit to include the aforedescribed lands in sec. 22 and the W½ of sec. 23. Simultaneously, he rejected the Riehle application insofar as it conflicted with the Phillips permit. Inadvertently, he failed to include the fractional E½ of sec. 23 in the Riehle permit.

Departmental regulation(43 CFR 195.17(a)) provides in pertinent part that a lease offer shall include, among other items, the following:

> (2) If the requested lands are surveyed, they should be described by legal subdivisions, showing meridian, state, township, range, and section; if not surveyed, by metes and bounds connected by courses and distances with some corner of the public land survey. When possible, the approximate legal subdivisions of unsurveyed lands should be stated.

This provision is comparable to provisions of sec. 192.42(d). Concerning that regulation the Department has held that an offer which does not adequately describe the lands applied for is in fact no offer at all, and an amendment, for curative purposes, is in fact a new offer which, for priority purposes may be considered as filed only when the amendment, viz., the curative action, is actually received in the Land Office. Sidney A. Martin, et al., 64 I.D. 81 (1957). It was previously held that the refiling of a proper offer, or as here - the amendment of a defective offer to a proper offer, is effective only from the date of refiling and may not preserve the original filing date for priority purposes. Cf. Arnold R. Gilbert, 63 I.D. 328 (1956). The Riehle application became a proper and valid application only upon receipt of the curative amendment in the Land Office on February 27, 1957. It was correct and proper for the Manager to consider the first properly filed application (Phillips'); and upon determination of Phillip's entitlement to reject the Riehle application to the extent of conflict with the prior filed application. This the Manager did, and to the extent that the Riehle application was rejected as to the lands lying within section 22 and the W½ of 23, his decision is affirmed.

As pointed out above, the Riehle application included the lands in the E½ of sec. 23; to that extent it was not in conflict with any prior filed application. Riehle, therefore, is entitled to have such lands included in his prospecting permit. Accordingly, when this decision becomes final, the case record Los Angeles 0136731 will be remanded, through the Bureau's Assistant to the State Supervisor at Los Angeles, for inclusion of those lands in the permit; Case record Los Angeles 0136851 will be returned for further processing of the permit application.

Mr. Riehle is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950, as amended by Circular No. 1962. See Information Sheet attached.

If appeal is taken by Mr. Riehle then he must serve a copy of all documents on the adverse parties, Messrs. R. C. Phillips and Walter B. Slagle, 4654 Sunnyside Drive, Riverside, California, within 15 days after filing the documents, and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

DISTRIBUTION:

Mr. Frank A. Riehle, Jr. (Certified Mail)
Messrs. R. C. Phillips and Walter B. Slagle (Regular Mail)
Minerals Staff Officer (5)
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Chief, Branch of Mining
Conservation Division
U. S. Geological Survey (10)
Each Case File LA-0136731 & LA-0136851
Appeals List No. 1
Geological Survey (6)
BF

appeal to Sec (11/19/58
affirmed A-17717 (11/14/58
65 ID

In reply refer to:

Contest Nos. 6797 and 6798
(California)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Apeil 15, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant : : Placer Mining Claims
: : and Millsite
v. : :
: :
Laura A. Duvall, et al. : :
Contestees : :
: :

Claims and Millsite Held Null and Void

The contestees, through their attorney, have appealed to the Director, Bureau of Land Management, from the decision of the Hearing Examiner, dated April 25, 1957, declaring null and void the Ortega Highway and County Line Placer Claims Nos. 1 and 2, and the Duvall and Russell Millsite Claim situated in sec. 31, T. 6 S., R. 5, W., and in sec. 36, T. 6 S., R. 6 W., and in sec. 1, T. 7 S., R. 6 W., S.B.B.M., California.

Adverse proceedings were initiated pursuant to complaints filed by the United States Department of Agriculture, Forest Service. The charges directed against the placer claims were:

> (a) The land embraced within the limits of the claims is nonmineral in character.
>
> (b) No discovery of mineral has been made.

The charge against the millsite claim was:

> The land is not used in connection with a vein or lode and does not comprise a quartz mill or reduction works.

The contestees filed a general denial to the charges and requested hearings to determine the truth of the charges. The causes were set down for hearing. Upon granting contestees' request for consolidation of Contest Nos. 6797 and 6798 for hearing purposes, hearing was had before a Hearing Examiner of the Bureau of Land Management at Los Angeles, California, on January 31, 1957 and February 1, 1957.

The attorneys for both parties to these proceedings filed a brief with the Hearing Examiner.

All the claims involved were located in the Cleveland National Forest after January 1, 1956 (Ex. 1 to 7). The evidence presented at the hearing related to decomposed granitic material; tungsten and zirconium therein; and massive granitic rocks and boulders on the claims.

The Hearing Examiner found there was insufficient evidence regarding the quality or quantity of the tungsten and zirconium found on the claims to induce a prudent person to believe that he would have a reasonable prospect of success in developing a valuable mine from these minerals, and therefore there has not been a discovery of a valuable deposit of either tungsten or zirconium on the claims. He also found from the evidence that although the deposits of decomposed materials and massive granitic rock found on the claims were marketable, they are common varieties of sand or stone not subject to location under the mining laws by reason of Public Law 167, 84th Congress (Act of July 23, 1955; 30 U.S.C. 601, 69 Stat. 367). He further found that the millsite claim is not being used in connection with a vein or lode and does not contain a quartz mill or reduction works.

The appellants assert that the Hearing Examiner's decision is not supported by the evidence and is contrary to the law in that tungsten oxide and zirconium oxide have been discovered within the limits of the claims which increases with depth warranting further exploration; that the nonmetallic material discovered on the claims, suitable for selective road base has special economic value as it is usable in its natural state without further processing, is in abundance, accessible, near the market and has been sold at a profit; and that the massive granitic rock in the claims has passed specifications for seawall construction; "all of which brings these materials within the purview of Public Law 167-84th Congress * * * and as such are locatable under the United States mining laws." It is also contended that the millsite location is valid for the reason that it is being used for mining and dumping purposes.

The contestees found a granite outcropping on placer No. 1, upon which they subsequently filed a lode claim designated as Los Tres Amigos No. 1. The lode claim is not involved in these proceedings except for its incidental effect.

I.

The witnesses who testified on behalf of the contestant were Joseph K. Trumball, district ranger of the Trabuca District of Cleveland National Forest; William R. Johnson, mining engineer and geologist; Charles R. Young, a highway engineer; and William Sanborn, mining engineer. The witnesses who testified on behalf of the contestees were E. O. Rodeffer, president of several firms producing road building materials; Clifford F. Russell, one of the contestees who worked on the claims; and Samuel Duvall, a miner, who originally located the claims.

II.

Under the mining laws of the United States (30 U.S.C. 1952 ed., secs. 21, 22 and 35) only "valuable mineral deposits" may be located and the lands must be valuable for minerals. Discovery of a valuable mineral deposit must be made within the limits of each claim. A valid discovery, it has often been held, is one which would warrant a man of ordinary prudence in the further expenditure of his time and money with a reasonable prospect of success in an effort to develop a paying mine. *Castle* v. *Womble*, 19 L. D. 455 (1894); *Chrisman* v. *Miller*, 197 U.S. 313 (1905); *United States* v. *Strauss, et al.*, 59 I.D. 129 (1945); *United States* v. *George W. Black*, 64 I.D. 93 (1957). Neither the discovery of an isolated bit of mineral not connected with or leading to substantial prospective values nor geologic inference as to what might be discovered at greater depths constitutes sufficient discovery. *East Tintic Consolidated Mining Co.*, 40 L.D. 271 (1911), and 41 L.D. 255 (1912); *United States* v. *Frank J. Miller*, 59 I.D. 446 (1947). Mere indications or belief in the existence of mineral on the claim do not amount to a discovery. *United States* v. *Frank J. Miller* (*supra*); *United States* v. *Arizona Manganese Corp.*, 57 I. D. 558 (1942). The statutory requirement of a discovery of the mineral cannot be satisfied by mere indications, however strong, of the existence of the mineral. *Nevada Sierra Oil Co.* v. *Home Oil Co.*, 98 Fed. 673, 675 (Calif. 1899); *2 Lindley on Mines* (3rd ed., 1914) secs. 336 and 437.

With respect to nonmetallic deposits of widespread occurrence, the pertinent considerations were summarized in *United States* v. *Strauss, et al.*, (*supra*, p. 138), as follows:

> "* * *But whether particular deposits of * * * mineral substances of wide occurrence are *valuable* mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, *held to depend upon the marketability of the deposit*. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, *bona fides*

in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. Ickes v. Underwood et al., 78 App. D.C. 396, 141 F. (2d) 546 (1944); Opinion of Acting Solicitor, 54 I.D. 294 (1933); Layman v. Ellis, 52 L.D. 714 (1929). In Big Pine Mining Corp., 53 I.D. 410, 412 (1931), the syllabus said:

> "'Lands containing limestone or other materials, which under the conditions shown in the particular case cannot probably be successfully mined and marketed, are not valuable because of their mineral content, nor subject to location under the mining law.'"

III.

Much was said in regard to the decomposed granitic material and massive granitic rock found on the claims. Witnesses for the contestant identified the decomposed granitic material as granodiorite, whereas those for the contestees preferred to call it quartz diorite. The contestees urged that the amount of quartz distinguished one from the other. It was disclosed that the quartz content in the former is about 10% and in the latter about 4% (Tr. 327). However, the essential difference or distinguishing feature is that granodiorite has orthoclase, a feldspar, in considerable amount and quartz diorite has only a minor amount of it (Tr. 122). Witnesses for the contestant testified that the decomposed granitic material in the claims was widespread, common, and constituted the country rock of the area (Tr. 55-56, 58-59, 136, 161-164, 327-328, and 335). In an attempt to overcome the latter testimony, Mr. Duvall, contestee's witness, identified Exhibit H, a published geological map of an area which embraces these claims prepared by Dr. Rene Engel. Counsel for the contestant objected to its admission in evidence on the ground that no qualification was shown of the person who prepared it and there was no opportunity to cross examine him. The objection will be considered in assessing the value of Exhibit H as evidence.

The massive granitic rock appears as individual boulders in the placer claims and in a large mass outcropping on the lode claim (Tr. 58, 60, 65, 250-251, 319). The boulders are in the ground mass of decomposed granitic material and as the weathering progresses the boulders gradually reduce in size. Their roundness is due to weathering from various planes of breakage, cooling cracks, or movement (Tr. 65-67, 330). They are part of the country rock of the area (Tr. 58).

The contestant's case in regard to the tungsten and zirconium found on the claims is predicated upon the testimony of its mineral examiners to the effect that the values indicated by the assays have no significance as these materials are disseminated throughout the area and are accessory minerals normally found in all granitic rocks. There is no reason to expect a concentration of these minerals with an increase in depth (Tr. 68-69, 73-74, 86, 136-137, 145, Exh. 21, 146-147, 150, 328, 329, 334). Zircon occurs as inclusions in some ferromagnesium minerals and in part of the feldspars (Tr. 86). The assays are the chemical analysis of the values of tungsten and zirconium. Contestant's Exhibit 20-A, a report of assay, shows values for zirconium oxide ranging from 0.21% to 0.33% and the values for tungsten oxide from nil to a trace. Contestant Exhibit 23, an assay report, shows values for zirconium oxide .44% and .25%, respectively and values for tungsten oxide .02% and .03%, respectively. It was brought out that .02% of tungsten oxide, four-tenths of a pound per ton, is more or less a trace, whereas, the zirconium oxide in sample K of the Exhibit shows an assay of about 8 pounds to a ton, at 2½ cents per pound (Tr. 143-144). The mineral examiner testified that since a good percentage of tungsten and zirconium is tied very closely to other minerals, it is not free to concentrate. Because the contestee proposed a tabling method of concentration, the quantity of these minerals recoverable by that method was the objective of his panning, which produces a like result. The yield after benefication for zirconium would be one pound per ton of rock, at 2½ cents per pound. The tungsten recovery would be slight (Tr. 144-145). It was also the opinion of the contestant's witnesses that tungsten and zirconium are not likely to be developed in large quantities on the claims in question (Tr. 334), and that there was no possibility of making a paying mine out of the tungsten or zirconium (Tr. 146).

Mr. Clifford Frank Russell, one of the contestees, testified that the decomposed granitic material was sold from the claims for road construction use and topsoil which included all the tungsten and zirconium and was sold without reference to those minerals being in it. He stated that they would continue to sell it in that manner (Tr. 242-244, 248). Mr. Duvall, one of the original locators, a miner and former owner of the claims, stated that the decomposed material on the claims suitable for road base which they are selling carries tungsten and zirconium in low grade (Tr. 321). Contestees' introduced Exhibit J, a report of assay, dated September 26, 1956, showing tungsten oxide .06% and zirconium oxide of .17%. The assay report, dated November 8, 1956, designated Exhibit K shows tungsten oxide .05% and .06%, respectively, and zirconium oxide .66% and .73%, respectively. Exhibit L refers to values in screened material. That which passed through plus 50 mesh screen shows tungstic oxide .05% and zirconium oxide .66%, while that which passed through the minus 50 mesh shows tungstic oxide .06% and zirconium oxide .73%. Another assay report, Exhibit M, dated January 22, 1957, shows tungsten trioxide .02% and nil.

IV.

The values of tungsten and zirconium shown in all of the assay reports are a chemical analysis which are not indicative of the recoverable amounts by the benefication process described by Mr. Duvall, the contestees' witness. Nor does the assay report of the screen separated material (Exh. L) reveal the percentages of material falling into the plus 50 mesh or minus 50 mesh catagories. While the values shown by the contestees' Exhibits J, K, and L are better than those in its Exhibit M and those shown in contestant's Exhibits 20-A and 23, we are persuaded they are not such values as would warrant an ordinary prudent man to expend further time and money with a reasonable prospect of success in an effort to develop a paying tungsten or zirconium mine, but rather are consistent with a finding of slight mineral values generally found in the country rock in the area.

Accordingly, the Hearing Examiner's decision that there has not been a discovery of valuable deposits of either tungsten or zirconium on the claims was correct.

V.

The contestees assert that the quality of the decomposed granitic material from the claims made it suitable for selected road base material (Tr. 37, 39) without further processing (Tr. 95, 95). Except for the statement of Mr. Rodeffer, contestee's witness, that his firms, suppliers of road building material and not road builders, have tested the decomposed granitic material from these claims in their laboratory for compaction and found it acceptable under the specifications of various political subdivisions (Tr. 90), his testimony is barren of any actual test results or comparison with minimum specifications of the county and State. On the other hand, Mr. Young, U.S. Forest Service, Highway engineer, a witness for the contestant, testified that in his laboratory samples from the claims were tested. He stated the results of those tests and compared them with minimum requirements of the California Highway Department. His testimony was to the effect that the material from the claims for road base stabilization is marginal and as an oil mix topping it cannot meet the minimum specifications of the State Highway Department (Tr. 159, 173).

The contestees contend that the massive granitic rocks are suitable for seawall construction. Mr. Russell, one of the locators, without having shown qualification, attempted to explain that certain tests (Exh. F) made on samples of the rocks revealed that they more than met the specifications required for the construction of a seawall (Tr. 226-230, 233-235). Mr. Young, highway engineer, testified that these boulders cannot be classified as fresh rock in that riprap requires fresh material to withstand extreme weather and wave action (Tr. 177-178). After careful consideration of all the evidence we are persuaded that the decomposed granitic material and the massive granitic rock are not shown by the evidence to be of commercial quality.

Even assuming that its quality is commercial, however, there remains the question of marketability of the deposits, which in part depends upon the existence of a present demand for the decomposed granitic material and massive granitic rock. There are assertions by the contestees that 900 to 1,000 tons of the decomposed granitic material were sold as road base material, that 65 tons were sold to the City of San Clemente, which wants 564 tons more for street and surfacing purposes (Tr. 236). Although Mr. Russell indicated that he kept the books for the operation, nothing was introduced into the record to evidence that sales were made and unfilled orders were on hand. (Tr. 222-224). Contestees' witness, Mr. Rodeffer, stated that it could be sold at a profit, although his firms had not purchased any of the material from the claims (Tr. 93). In regard to the massive granitic rocks in the claims the contestees' witnesses, Mr. Russell and Mr. Rodeffer, asserted that a low bid for the construction of a seawall with boulders from these claims was made by an unidentified contractor and his bid was later rejected (Tr. 101, 231-232). These are unsupported statements and as such have little probative value. Demand in the market must be shown by substantial evidence. Based on the record we are not persuaded that a demand for these materials has been established. United States v. Estate of Victor E. Hanny, 63 I.D. 369.

The further assertion by the contestees that the cost per ton to extract and transport the decomposed granitic material to market was less than the price for which it was sold, is not sufficient to show that it was being sold at a profit. We are not persuaded that the requirement of marketability at a profit of the deposits of decomposed granitic rock and massive granitic rocks and boulders, has been met. Accordingly, the finding of the Hearing Examiner to the contrary is reversed.

VI.

The decision below concluded that the deposits were a common variety of stone or sand not subject to location under the mining laws. Assuming, arguendo, that they are marketable at a profit, that question will now be considered.

The contestees assert on appeal that because the decomposed granitic material on the claims is suitable for selective road base in its natural state and because the massive granitic rock or boulders on the claims allegedly fulfill specifications for seawall construction, they are removed from the common varieties of sand or stone described in Public Law 167, 84th Congress, approved July 23, 1955 (69 Stat. 367; 30 U.S.C., 1952 ed., Supp. IV, sec. 611) and, therefore, are locatable under the mining laws.

The mining laws of the United States were amended by the section 3 of the act of July 23, 1955. It provides:

> "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. 'Common varieties' as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called 'block pumice' which occurs in nature in pieces having one dimension of two inches or more."

Departmental regulation 43 CFR, 1956 Supp. 185.121 implements section 3 of that act. Subsection (a) of the regulation recites section 3 of the act. Subsection (b) of the regulation is as follows:

> "(b)'Common varieties' as defined by definition of the Department and of the courts include deposits which although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Section 3 of the law has no application where mineral for which a location is made is carried in or borne by one of the common varieties."

On a location made on or after July 23, 1955, the "common varieties" enumerated in the act are not substances subject to location under the mining laws, but are materials within the contemplation of the Materials Act of July 31, 1947, as amended July 23, 1955 (61 Stat. 681, 69 Stat. 367; 30 U.S.C., 1952 ed., Supp IV, Sec. 601). The Congress, by the enactment of the act of July 23, 1955, supra, has stated that common varieties of sand, stone, gravel and certain other materials "shall not be deemed a valuable mineral deposit within the meaning of the mining laws so as to give effective validity to any mining claims thereafter located under such mining laws: * * *"(Emphasis added). The obvious purpose of this declaration was simply and solely to remove these minerals from the operation of the mining laws which in terms included "all valuable mineral deposits in lands belonging to the United States * * *" (30 U.S.C. sec. 22), except those that are valuable deposits because they "have some property giving it a distinct and special value * * *." The meaning of "common varieties" of minerals excluded from location under the mining laws by virtue of the act of July 23, 1955, is evidenced by the statement on the floor of the House of Representatives by the Chairman of the Committee which reported the bill (H. R. 5891, 84th Congress 1st Session). After saying that the bill prohibits future location of these "common varieties" he said:

> "The reason we have done that is because sand, stone, gravel, pumice, and pumicite are really building materials, and are not the type of material contemplated to be handled under the mining laws * * *." (101 Cong. Rec. 8743 (1955))

However, this broad statement that common varieties of sand, stone, gravel, etc., are "building materials" is modified only by the second sentence of the proviso itself where an exception is made of sand, stone, gravel, etc., "which are valuable because the deposits have some property giving it a distinct and special value * * *."

The Department has long held that not all substances because they may have some use are locatable under the mining laws. In this connection reference is made to the ruling of the Department in Holman, et al., v. State of Utah, 41 L.D. 314 (1912), wherein it was said that:

> "It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character.

> In one sense, all land except portions of the top soil is mineral. The term, however, in the public land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. It is not intended to hereby rule that there may not be deposits of clay and limestone of such exceptional nature as to warrant entry of the lands containing such deposits under the mining laws."

The Department recognized that common varieties of substances such as gravel do have distinguishing special characteristics and possess economic value in trade, manufacture, the sciences or in the mechanical or ornamental arts. In Layman et al v. Ellis, 52 L.D. 714, 719 (1929), it was observed that:

> "As gravel is not composed always of the same mineral substances, it would not be expected that gravel would appear in a strict mineralogical classification based on definite chemical composition, but examination of the decision of the department and the courts disclose that questions whether a given substance is locatable or enterable under the mining laws are not resolved solely by the test of whether the substance considered has a definite chemical composition expressible in a chemical formula. * * * While the distinguishing special characteristics of gravel are purely physical, notably, small bulk, rounded surfaces, hardness, these characteristics render gravel readily distinguishable by any one from other rock and fragments of rock and are the very characteristics or properties that long have been recognized as imparting to it utility and value in its natural state. * * * [G]ravel is generally recognized as having special characteristics that render it valuable in the mechanical arts."

Also see Lindley on Mines, Sec. 98.

The Department in promulgating regulations (43 CFR, 1956 Supp., 185.121(b)) to implement the act of July 23, 1955 confirmed these observations in specifically noting that common varieties are those "deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts," unless they "possess a distinct, special economic value for such use over and above the normal use of the general run of such deposits."

The alleged special properties attributed to the substances on the claims in these proceedings are not such properties as impart intrinsic value to them within the contemplation of the act.

Where marketability at a profit of deposits of sand, stone, gravel, etc., is established, that alone is only evidence that they are valuable mineral deposits and by virtue of the act of July 23, 1955, they are not subject to location under the mining laws. To remove such deposits of sand, stone, gravel, etc., from the purview of common varieties, under the act, they must possess properties which give them distinct and special value.

While at most, the alleged characteristics of the decomposed granitic material and the massive granitic rocks or boulders on these placer claims show that they might have some economic value in the mechanical arts, this alone is insufficient to justify a belief that they are other than commonplace sand and stone. In the absence of any evidence of distinct characteristics or properties showing that these deposits are so unusual, exceptional or unique as to add to the value of such deposits in the market for uses over and above the normal uses of the general run of such deposits, the deposits on the claims cannot be other than common varieties of sand and stone. Therefore, the Hearing Officer's finding that the materials in the Ortega Highway and County Line Placer Nos. 1 and 2 are common varieties of sand or stone not subject to location under the mining laws of the United States was correct.

VII.

The contestees contend on appeal that the millsite is valid for the reason that it is being used for mining and dumping purposes.

Laura A. Duvall and Clifford F. Russell located their millsite claim on March 15, 1956, pursuant to Revised Statute 2337 (30 U.S.C., 1952 ed., sec. 42), which provides in part:

> "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented. * * * The owner of a quartz mill or reduction works, not owning a mining claim in connection therewith, may also receive a patent for his millsite, * * *."

The testimony at the hearing disclosed that on the millsite a turnaround was under construction (Exh. 13, Tr. 31, 25-4-56). It was stipulated by the contestees that on the millsite there was a stockpile, a bench and 4 or 5 seats (Tr. 86 257, 262). A week prior to the hearing a witness for the contestant saw a little trailer, and a skiploader on the site, but he saw no real production work or what he would call milling or treatment (Tr. 87). The contestees' witnesses stated they had removed and disposed of topsoil from the millsite (Tr. 246); admitted the material stockpiled thereon came from Placer Claim No. 1 (Tr. 262, 318); disclosed that it was used up to the time of the hearing for stockpiling, and to dump tailings on; like brush, etc.; and related that the millsite has no other present use (Tr. 318). There are no improvements on the millsite.

The Department held in the case of Alaska Copper Company, 32 L.D. 128 (1903), that under section 2337:

> "* * * the nature of the use or occupation of the ground is prescribed, and the character of the utilities requisite for either of such specified purposes is by necessary implication made manifest. A millsite is required to be used or occupied distinctly and explicity for mining or milling purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling or treatment of the ore from the vein or lode."

Nothing on the millsite including the stockpiled material, the tailings as well as the portable equipment, was directly connected with the lode claim, rather their use is solely in connection with the placer claims. A millsite to be valid under the first clause of the statute must be used in connection with a lode claim Peru Lode and Millsite, 10 L.D. 196; Lindley on Mines, sec. 523. Since the millsite was not used for mining and milling purposes associated with a lode claim and in the absence of a quartz mill or reduction works thereon, the evidence to support the millsite falls short of the requirements of the statute. United States v. Reinartz, A-25808 (April 25, 1950), A-25808 (Supp.) (August 6, 1951). Therefore, the Hearing Examiner's finding regarding the millsite was correct.

The charges against the Highway and County Line Placer Claims Nos. 1 and 2, and the Duvall and Russell Millsite claim have been sustained. Accordingly, the Hearing Examiner's decision that the claims are null and void is affirmed.

Mrs. Laura A. Duvall and Mr. Clifford Russell are allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee for each mining and millsite claim on which favorable action is sought. Each appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp, Part 221, contained in Circular No. 1950 as amended by Circular No. 1962. See Information Sheet attached.

If appeal is taken by Mrs. Laura A. Duvall and Mr. Clifford Russell then they must serve a copy of all documents on the adverse party, Office of the General Counsel, United States Department of Agriculture, 212 Federal Office Building, Civic Center, San Francisco 2, California, within 15 days after filing the document, and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Edward Woozley
Director

Attachment

DISTRIBUTION:

Mr. Frederick Brunner, Attorney for Appellants (Certified Mail)
Mrs. Laura A. Duvall (Regular Mail)
Mr. Clifford Russell (Regular Mail)
Office of the General Counsel, U.S. Department of Agriculture (Regular Mail)
Minerals Staff Officer
Mr. John Sieker, U.S. Department of Agriculture (8)
Appeals List No. 1
Hearings Administrative Officer
WHW

appeal to Sec
affirmed A-27744 - 11/19/58

In reply refer to:

Contest 3-951
(Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 9, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant :
vs. :
John B. Kathe, Jr., Contestee :

Mineral Contest No. 3-951
involving Atir Placer Claim
located in sec. 28, T. 6 N.,
R. 6 E., S.B.M., California

Appeal Dismissed
Hearings Officer's Decision Affirmed

John B. Kathe, Jr., has appealed to the Director, Bureau of Land Management, from a decision dated February 27, 1956, by Hearings Officer Graydon E. Holt, declaring null and void the Atir Placer Claim located in sec. 28, T. 6 N., R. 6 E., S.B.M., California.

Adverse charges, alleging that the lands within the claim were nonmineral in character and that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery, were served on the contestee, November 1, 1954. Upon his denial of the charges, a hearing was scheduled for November 10, 1955. On November 2, 1955, an affidavit was received from the contestee stating "that he, the contestee, will be unable to appear personally at*** /the hearing7 *** on November 10, 1955, and that he hereby rests his case on the evidence submitted herewith. The undersigned contestee does not wish that the case be postponed, but rather that it be decided at the scheduled hearing on November 10, 1955, on the basis of contestee's evidence herewith submitted ****."

As evidence the contestee submitted with his affidavit a photograph of the deposit of clay found on the claim, a sample of that clay, a chemical analysis of the clay as reported by Kaiser Company, Inc., Fontana, California, and two letters sent to him by Mr. J. E. Ieland, of Los Angeles, California, in August 1946, expressing interest in the deposit on the claim.

After a postponement, the hearing was held January 25, 1956. The contestee did not appear at the hearing, nor was he represented by counsel. The rules of practice, in effect at the time of this hearing, 43 CFR, 1954 ed., 221.49 provided:

> "No person who has failed to answer the contest affidavit, or, having answered, has failed to appear at the hearing, shall be allowed an appeal from the final action or decision ***."

Thus, since Mr. Kathe failed to appear at the hearing, he has no standing to appeal, and his appeal is subject to dismissal. See Director's decision in Contest 5037 (Los Angeles) Matthews vs. Gillbergh and United States, March 20, 1956.

However, even if this procedural defect were not present there appears to be no basis for reversing the decision of the Hearings Officer. Arthur C. Kinsley, mining engineer for the Bureau of Land Management, who was the only witness at the hearing, testified that the only mineral found on the claim exists in the form of a ridge-like deposit of clay. He testified that such clay is no longer used for flux purposes in steel mills, and that the clay is of poor quality useful only for common brick, sewer pipe and similar uses. He also asserted that there is insufficient clay on the claim to justify the erection of a kiln at the site, and that the only possible market for such clay is too distant to make the extraction and marketing of the clay economically feasible.

As noted above, Mr. Kathe's exhibits in support of his claim included a letter dated May 24, 1945, from the Kaiser Company, Inc., enclosing an analysis of a sample of clay Mr. Kathe had sent to him, and stating at that time they had an ample supply of flux clays from sources closer to their plant. The letter dated August 1, 1946, from Mr. Leland (who is not otherwise identified) states that "A large group of mining operators with whom we are in touch have asked us to firm up a deposit of this kind of clay." The letter dated August 6, 1946, from Mr. Leland indicated urgency on the part of this group of mine operators to get to work on such a brown clay property. It is noted these letters were written more than nine years before the hearing.

Under the United States mining laws a valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim (30 U.S.C., 1952 ed., secs. 22 and 35.) There must be a mineral discovery of such nature as would justify the expenditure, by a man of ordinary prudence, of time and money in an effort to develop a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905). When in a hearing the Government (contestant) has shown that the material found on the claim is a mineral substance of common variety of no substantial intrinsic value, the mineral claimant (contestee) must establish that the particular deposit "is of such value that it can be mined, removed, and disposed of at a profit" to warrant his continued holding of the claim. United States v. Strauss, et al., 59 I.D. 129 (1945). Thus "value," when applied to a deposit of common material such as clay, is defined in terms of a present market for the material and its proximity to the market. United States v. George W. Black, 64 I. D. 93 (1957).

The contestant's evidence in this case shows that the clay on this claim is a common variety of material, of relatively low grade. The contestant's Exhibit 5, a letter from Kaiser Steel Corporation, shows that company discontinued using flux clays in its Fontana plant furnace operations in 1946, thus negativing any potential value for this purpose which might be suggested by contestee's letter of 1945 from Kaiser. The contestee's letters from Mr. Leland tend to show merely a vague, indefinite interest by unidentified mine operators, some nine years before the hearing. Though they were reported to be eager to develop such a deposit, no evidence has been submitted of any further or definite expression of interest in subsequent years. The data supplied are wholly insufficient as evidence tending to establish present market value.

The evidence submitted by the contestee and that taken at the hearing permit of no other conclusion than that the Government has sustained its charges and that the Atir Placer claim is null and void. In his appeal, Mr. Kathe submitted no new evidence, nor did he refute any of the evidence submitted by the Government. Accordingly, it is concluded that the decision of the Hearings Officer, which is correct and in accordance with the law, is affirmed.

Mr. John B. Kathe, Jr., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Acting Director

Enclosure

DISTRIBUTION:
Mr. John B. Kathe, Jr. (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
VJR

35615

appeal to Sec
affirmed A-27732 11-13-58
65 ID

In reply refer to:

PL 12-15
Sacramento 054081
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 14, 1958

Certified Mail
Return Receipt Requested

DECISION

Hines Gilbert Gold Mines Company	:	Verified Statement

Acting Manager's Decision Affirmed

The Hines Gilbert Gold Mines Company has appealed to the Director of the Bureau of Land Management from a decision of the Acting Manager of the Land Office, Sacramento, California, dated September 12, 1957, holding that the verified statement filed by the company was not timely submitted, and that the company's right to use the surface resources of certain unpatented mining claims is therefore subject to the limitations of Section 4 of the Act of July 23, 1955 (30 U.S.C., 1952 ed., Supp. IV, sec. 612).

The Act of July 23, 1955, limits the uses which may be made of the surfaces of claims located after the date of the passage of the Act. In addition, the Act provides a procedure whereby persons who have made mining locations before the date of the Act must, when called upon to do so by a published notice, assert their rights to the use of the surface. Persons not timely asserting their rights to the use of the surface also become subject to the limitations of the Act. This assertion of rights takes the form of a verified statement, made in the manner specified in Section 5 of the statute, and in sections 185.123 to 185.137 of the regulations (Title 43, Code of Federal Regulations). Section 5 of the Act states that:

> "If any claimant under any unpatented mining claim heretofore located which embraces any of the lands described in any notice published in accordance with the provisions of subsection (a) of this section, shall fail to file a verified statement * * * within one hundred and

> fifty days from the date of the first publication of such notice, such failure shall be conclusively deemed, except as otherwise provided in subsection (e) of this section,
>
> (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and
>
> (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and
>
> (iii) to preclude thereafter, prior to issuance of patent any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims."

On March 21, 1957, a notice was published pursuant to the provisions of this Act in the Auburn Journal, Auburn, California. The Hines Gilbert Gold Mines Company submitted its verified statement to the Land Office on August 20, 1957, 152 days after the first publication of the notice. The express language of the statute is that the failure to file the verified statement within 150 days after the first publication is conclusively deemed a relinquishment of certain rights to use the surface. It is beyond the authority of this Department to deviate from the clearly expressed will of Congress. Since the verified statement was not filed within the 150-day period, and even though it was filed only one day after the expiration of that period, 1/ the appellant must be deemed to have relinquished the right to use the surface of the mining claims in a manner inconsistent with the Act of July 23, 1955. The decision of the Acting Manager is therefore affirmed.

On May 29, 1957, application for patent was filed by the appellant for a number of claims, some of which are included in the verified statement. It may be inferred from its brief that the appellant believes the adverse action on the verified statement to be an adverse action also on the application for patent, and that the rejection of the verified statement extinguishes the mining claims. But this is incorrect; the rejection of the verified statement does not affect adversely the application for mineral patent; it merely limits the degree to which, prior to patent, the land may be used for nonmining purposes. Upon the issuance of patent for any mining claim, the

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1/ August 18, 1957, the 150th day, fell on a Sunday; therefore the appellant had until the close of business on August 19, the 151st day after the first publication of the notice, to file the verified statement.

restrictions resulting from the failure timely to file a verified statement are no longer operative, and a mining claimant then acquires full right to use the surface as well as the mineral resources of the land.

The Hines Gilbert Gold Mines Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Acting Director

Enclosure

DISTRIBUTION:

Hines, Gilbert Gold Mines Company (Regular Mail)
Messrs. Gilmore & Gilmore, Attorneys at Law (Certified Mail)
Minerals Staff Officer (5)
Appeals List No. 1
MG

35615

In reply refer to:

Contest No. 5234
(Sacramento)
5.04g

May 16, 1958

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant,	:	Piedra Grande Lode Mining Claim
	:	situate in secs. 10 and 11, T. 25
v.	:	N., R. 9 W., M.D.M., California.
	:	
Carl L. Jennings, Contestee.	:	
	:	

Decision of Hearings Officer Affirmed;
Claim Declared Null and Void

Carl L. Jennings has appealed to the Director, Bureau of Land Management, from a decision dated October 13, 1954, of Hearings Officer Robert T. Felton, involving the Piedra Grande Lode Mining Claim, located by the contestee within Tehama County, California, upon a portion of the Mendocino National Forest. The Hearings Officer held that a valid discovery had not been made within the limits of the claim and that charges brought by the contestant against the claim had been sustained.

The claim was located in June 1954. Pursuant to letter received July 16, 1954, from the Regional Forester, California Region, U.S. Forest Service, adverse proceedings were initiated against the claim under Contest No. 5234, on the following charges:

> (1) No discovery has been made of valuable minerals in sufficient quantity and of sufficient quality to warrant a reasonably prudent person in the expenditure of time and effort in attempt to develop a paying mine;
>
> (2) The land within the boundaries of the claim is nonmineral in character.
>
> (3) The land within the boundaries of the claim is more valuable for National Forest purposes than for mining.

Notices of the charges was served on Carl L. Jennings on July 22, 1954, and at his request a hearing to determine the truth of the charges was held in the Land Office, Sacramento, California, on September 23, 1954. The contestant was represented by David Kaplan, Attorney for the United States Forest Service, San Francisco, California. The contestee was present and was represented by Alfred E. Frazier, Attorney at Law, Red Bluff, California.

After the filing of the notice of appeal by the contestee, the attorney for the Forest Service filed with the Director, a motion to dismiss the appeal. The motion was submitted pursuant to 43 CFR, 1954 ed., 221.50, the Departmental regulation then in effect, which provided:

> "Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal, in the form of specifications of error, which shall be separately stated and numbered; where error is based upon insufficiency of the evidence to justify the decision, in the assignment thereof the particulars wherein it is deemed insufficient must be specifically set forth in the notice. All grounds of error not assigned or noticed and argued in the brief will be considered as waived."

It was the contention of the contestant's attorney that the appellant had not complied with these requirements, and that the stated grounds for appeal were not well founded, and accordingly that the appeal should be dismissed.

The contestee's attorney filed an answer to the motion to dismiss.

It is not clear from the record whether at the time of preparing his motion to dismiss, the attorney for the Forest Service had before him the brief in support of the appeal, timely filed by the appellant. However, in that brief the appellant, frequently referring to the testimony, briefly argued each of the points of error set forth in the notice of appeal. Since the notice of appeal, and the supporting brief, when considered together, appear to meet the requirements of the regulations we find the motion to dismiss to be without merit, and it is accordingly dismissed. We turn now to the merits of the case.

As noted in the decision of the Hearings Officer, upon agreement between the attorneys for each party, the third charge against the claim was dismissed.

The contestant offered the testimony of two witnesses, Mr. William C. Sanborn, Mining Engineer of the United States Forest Service, and Mr. Orel Uhl, an employee of the United States Forest Service. Mr. Sanborn testified that he examined the claim on July 21 and September 2, 1954 (Tr. 4); that there is an "open cut" excavation in the central part of the claim (Tr. 9); that he took one sample on July 21 (Tr. 12); and three additional samples on September 2 (Tr. 13) and that three of these samples were assayed by Abbot A. Hanks, Inc., assayers, San Francisco, California (Ex. #6 and #7) and showed no gold or silver and less than 0.01% chromic oxide. The fourth sample, taken in the open cut, was not assayed since no rock in place was exposed in the cut and hence the sample was taken from alluvial, landslide debris, or erosional material (Tr. 15). He also testified that he found no indications of chrome on the claim (Tr. 16) and did not see a vein or lode of any sort on the claim (Tr. 17) though he searched diligently for both. He also testified that he believed a reasonably prudent man would not be justified in spending time and money with a reasonable chance of making it a paying mine (Tr. 17). Mr. Uhl testified that in the past he had been employed to prospect for chrome and had other practical experience in mining chrome (Tr. 35); that he would recognize a chrome deposit if he saw it (Tr. 37, 41); that he examined the claim on September 22, 1954 (Tr. 38) at the request of the District Forest Ranger (Tr. 46), and he saw no chrome on the claim (Tr. 40, 41).

The contestee offered the testimony of three witnesses, George W. Nielsen and Warren A. Labarthe, both mining engineers, and Carl L. Jennings, the claimant.

Mr. Nielsen testified that he spent most of one day on the claim in the early part of September (Tr. 57); that he took three samples about the center of the claim (Tr. 58); that a fourth sample was taken near the southeast end of the claim (Tr. 60); sample No. 5 was not taken on the claim (Tr. 60), and sample No. 6 was taken by panning in the spring near the road on the claim (Tr. 61). These samples were sent to Abbot A. Hanks, Inc., together with a piece of float previously found by Mr. Jennings, for assaying (Tr. 62). The samples, assayed for chromic oxide, showed values of .09%, .11%, .14% and .16% for the samples taken on the claim by Mr. Nielsen and 44.5% for the piece of float rock submitted by Mr. Jennings. Mr. Nielsen also testified that he saw two basic dikes running across the claim near the northwest and southeast ends of the claim (Tr. 64, 76); and that he believed the lode will be found in these dikes (Tr. 78). He stated that chromic oxide generally does not occur in well defined veins but occurs rather in large, lenticular kidneys or ore bodies (Tr. 69); that no such kidneys or lenses were visible on the surface of this claim (Tr. 73), but that he thinks there is a reasonable possibility based on surface indications of finding such a deposit underground (Tr. 80, 82).

Mr. Jennings testified that he located the Piedra Grande claim in June 1954 (Tr. 83) and that about two weeks after locating the claim he found the piece of rock, identified as Sample No. 7, which he gave to Mr. Nielsen for assaying (Tr. 83); that he took three samples of the rock and sent them to the California Division of Mines (Tr. 96); and that they reported (Ex. D) that "The dominant mineral is black spinel (magnesium, iron, aluminum, and chromium oxide) and the subordinate mineral is white chlorite (magnesium and aluminum silicate)."

Mr. Labarthe testified that he examined the claim for chrome at the request of Mr. Jennings (Tr. 105); that he was on the claim for about an hour (Tr. 106); that he saw two veins running across the claim, which he identified as the dikes referred to by Mr. Nielsen (Tr. 105, 126); that the most westerly of these dikes or veins he had traced on an adjoining claim and that while on the Jennings claim he had seen it from a distance of 400 feet but had not approached any closer (Tr. 110); that the outcrop on the easterly portion of the claim contained chromium oxide plainly visible (Tr. 114, 115), and that he would estimate that these outcrops ran 20% chromium oxide (Tr. 117). He further testified that it would be impossible to detect a lens of chrome oxide from the surface (Tr. 126) but that the evidence he found would justify a prudent person to expend further time and effort and money in development of the claim (Tr. 106).

On reexamination Mr. Sanborn stated that he crossed each of the lines on which the dikes referred to by Mr. Nielsen and Mr. Labarthe are alleged to lie, at least four times (Tr. 130) but that he saw no outcropping structure lying in the position indicated on the western portion of the claim (Tr. 131) and that the only structure exposed on the eastern portion of the claim lies in the northeast corner and consists of schistose material, having no different characteristics than the surrounding country (Tr. 130, 131); and further that it was "not basic rock by any stretch of the imagination" (Tr. 132); nor would this outcropping constitute a vein or lode (Tr. 131).

At the conclusion of the hearing the Government attorney moved for a continuance to allow a joint examination of the claim by engineers for the Government and the contestee (Tr. 132). The motion was opposed by the attorney for the contestee on the ground that the burden of proof lay with the Government, and that the claimant was entitled to a decision on the merits of his case as presented. The Hearings Officer did not rule on the motion.

It is a principal contention of the claimant that the charges instituted against the claim by the Government do not include the charge that there is no vein or lode on this claim and that any findings relative thereto should have no bearing on the validity of this claim. However, "discovery" in the text of the United States mining laws appears in the following context" "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." R.S. 2320, 30 U.S.C., 1952 ed., sec. 23. Thus the law states that what must be discovered is a vein or lode, and the charges brought by the Government, of necessity, involve the question of determination of the existence of the vein or lode.

It is also argued that charges were preferred against the claim within only a short time after its location. While discovery need not necessarily preceed location, a notice of location posted upon mineral land before discovery of a vein or lode is an absolute nullity insofar as acquiring rights against the United States is concerned. Bonner v. Meikle, 82 Fed. 697, 698; Cf. Instructions, Colville Reservation-Mining Claims-Allotments 38 L.D. 409 (1910). Furthermore neither law nor regulation specify any minimum time that must elapse before adverse proceedings can be instituted.

The testimony of Mr. Sanborn is firm and unequivocal that he found on the claim no evidence of chrome or others deposits of valuable mineral. This testimony was unshaken in cross-examination, and it is supported by assay reports submitted into evidence with some of the samples assayed having been taken in the immediate area of the contestee's workings on the claim.

The observations of Mr. Sanborn however were not in agreement with those of Mr. Nielsen and Mr. Labarthe, the mining engineers who examined the claim for the contestee. Since neither party to the contest examined the claim in the presence of representatives of the other party, the observations of the contestee's witnesses must be carefully weighed. This is particularly true since the record shows most of their samples were taken from locations other than those sampled by Mr. Sanborn. Furthermore, it should be pointed out that although Mr. Neilsen stated that the lode on the claim would lie on the dikes he alleged existed there, he took only one of his samples from the area of this dike, Sample No. 4, and it assayed 0.11% chromic oxide. Mr. Labarthe stated that he also took a sample in this area but that it had not been assayed as yet. Moreover, the small amounts of chromite revealed in the samples taken by Mr. Neilsen show no connection with any body or mass of ore. This is admitted by the witnesses for the contestee. In addition, the amount of chromite shown in the assays is not substantially greater than that known to exist in all subsilicic, igneous rocks, which is estimated at 0.05%. 1/

1/ Data of Geochemistry, U.S. Geological Survey Bulletin 616, 3rd Ed., 1916, p. 32.

The piece of high grade ore found by Mr. Jennings is considered of no significance since the evidence shows that it was not a sample of rock in place but merely float; the claimant not having identified the precise place where it was found; and no showing having been made of any persistence of such chromite deposit anywhere on the claim in issue.

The question then is whether the existence of exceedingly small surface evidences of the presence of chromium, not shown to be connected to any body of ore, is a sufficient discovery on which to base a mining claim. The Department has considered this question in a similar case, East Tintic Consolodated Mining Company, (On Rehearing), 41 L.D. 255 (1912), where it was held:

> "The so-called discoveries on the surface of the various claims are supposed to indicate that other and unconnected veins or lodes lie at a greater depth. In other words in these cases there is an apparent attempt to substitute observation, combined with geologic inference for discovery. Whatever may be thought of its policy, Congress has said in section 2320 of the Revised Statutes: 'but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' Obviously, the words 'the vein or lode' can only refer to the lode which is expected to develop and mine and cannot refer to disconnected bodies of ore of no possible value in themselves. Congress having laid down this rule for the guidance of the Department, the Department can do nothing but follow the will of Congress in this particular. If the rule is in general, as has been insisted, too narrow a one, or if it does not fit particular localities, obviously the remedy is to be sought in the hands of Congress; and it would be usurpation of authority in this Department to attempt to amend, directly or indirectly, the unmistakable language of the statute."

The references in the quotation above to the inapplicability of the rules of discovery in certain localities is related to a point raised by the appellant, namely that deposits of chrome in this area are not normally found in veins or lodes. The contestee urges that the alleged dikes of pegmatite from which the Neilsen and Labarthe samples were taken, should meet the requirements of the law. Mr. Labarthe has even referred to these outcrops as veins. However, the Department has given a clear expression of its opinion on a similar issue in the case of Rough Rider and Others Lode Claims, (On Rehearing), 41 L.D. 255 (1912), where it was held (Syllabus):

> "Country rock in which it is claimed 'Kidneys' of copper ore may be expected to be found, is not itself a lode within the meaning of the mining laws, and the exposure of such rock

> within the limits of a lode claim, which may or may not contain mineral, does not constitute the discovery of a vein or lode within the meaning of the mining law and is not a sufficient basis to support a lode location."

There appears to be no reason to draw a distinction between the "kidneys" of copper which were alleged to lie in the Rough Rider Claims and the "kidneys or lenses" of chrome alleged to lie in this claim.

Thus we find that even if full credence may be given to the evidence submitted by the witnesses for the contestee, the showing on this claim does not constitute a sufficient discovery under the law and the principles established by the Department for determining the validity of these claims. Therefore, it is found that the cogent evidence submitted by the witnesses for the Forest Service is sufficient to sustain the charges instituted by the Government, and that the evidence for the contestee, even if fully credible, does not overcome the prima facie showing by the contestant of the invalidity of the claim.

Accordingly, it is found that the charges brought against these claims have been sustained. The decision of the Hearings Officer is affirmed, and the claim is declared null and void.

Carl L. Jennings is allowed the right of appeal to the Secretary of the Interior. If appeal is taken, a Notice of Appeal must be sent directly to the Director, Bureau of Land Management, Washington 25, D. C., in time to be received there within 30 days after receipt by the appellant of this decision, and must be accompanied by a $5.00 filing fee. The appeal must be supported by a Statement of Reasons which may accompany the Notice of Appeal. If a Statement of Reasons does not accompany the Notice of Appeal, then the Statement must be sent directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 30 days after the Notice of Appeal is received by the Director. Strict compliance must be made with the requirements of the rules of practice, 43 CFR, 1956 Supp., Part 221, contained in Circular No. 1950, as amended by Circular No. 1962. See Information Sheet attached.

If appeal is taken by Mr. Jennings then he must serve a copy of all documents on the adverse party, Regional Forester, California Region, U.S. Forest Service, 630 Sansome Street, San Francisco, California, within 15 days after filing the document, and must send proof of that service, as required by 43 CFR 221.34 and 221.95, directly to the Secretary of the Interior, Washington 25, D. C., in time to be received there within 15 days after service, unless such proof accompanied the Notice of Appeal.

Earl J Thomas

Acting Director

Attachment

Distribution - page 8

DISTRIBUTION:

Mr. Alfred.E. Frazier, Attorney at Law, (Certified Mail)
Mr. Carl L. Jennings, (Regular Mail)
Regional Forester, California Region (Regular Mail)
Hearings Administrative Officer
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Seiker, (8)
Appeals List No. 1
VJR

appeal to Sec
affirmed A-27871 5-13-59

In reply refer to:

Contest No. 5229
(Sacramento 045935)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 26, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	:	Contest No. 5229, involving Sugar Pine Lode, situated in $E\frac{1}{2}NE\frac{1}{4}$ sec. 19, and $W\frac{1}{2}NW\frac{1}{4}$ sec. 20, T. 3 N., R. 7 E., H. M., California, Mineral Survey No. 6503.
v.	:	
Julius R. Guglielmetti, Contestee	:	

Manager's Decision Affirmed

Julius R. Guglielmetti has appealed to the Director, Bureau of Land Management, from a decision of Hearings Officer Robert T. Felton dated June 14, 1955, which rejected his mineral patent application, Sacramento 045935, for the above-identified lode mining claim.

The Regional Forester of the United States Forest Service by letter dated March 5, 1954, filed a protest against the issuance of a patent, based on the following charges:

1. That there has been no discovery of minerals made upon the claim;

2. That the land within the claim is nonmineral in character; and

3. That the land within the claim is more valuable for national forest purposes than for mining.

The contestee denied the charges and requested a hearing, which was held in Sacramento, California, February 24, 1955. The United States was represented by David Kaplan of the Office of the General Counsel, United States Department of Agriculture, San Francisco, California. The contestee appeared for himself and without benefit of an attorney.

The United States offered the testimony of William C. Sanborn, mining engineer, and Raymond L. Beals, district forest ranger, both employees of the U. S. Forest Service. Mr. Guglielmetti testified in his own behalf.

Mr. Sanborn testified that he examined the claim with Mr. Beals October 1, 1952, and again September 16, 1954, in the company of Mr. Guglielmetti. Four samples were taken from the excavations on the claim on the earlier trip and three additional samples were taken on the latter trip. The samples were assayed by Abbot A. Hanks, Inc., of San Francisco, and the results shown on Exhibits D, E, and F are as follows:

Sample No. 1 -	Manganese	0.21%
Sample No. 2 -	Manganese	6.42%
Sample No. 3 -	Manganese	5.22%
Sample No. 4 -	Manganese	8.95%
	Silica	44.51%
	Iron	20.57%
	Aluminum Oxide	2.15%
	Phosphorous	0.58%
Sample No. 5 -	Manganese	6.84%
	Silica	55.80%
Sample No. 7 -	Manganese	3.32%
	Silica	64.48%
Sample No. 6	Manganese	7.04%
	Silica	33.72%

Mr. Sanborn stated that these figures could not be satisfactorily translated into dollar values since the minimum grade of material acceptable for government's stockpiling purposes is 15% manganese, for which the price paid is $8.54 a long ton, at Winden, Arizona. The steel industry, he asserte is not interested in purchasing manganese ore that does not run 35% manganese. He also stated that the high silica content would also make the manganese found on this claim unacceptable for government or commercial purposes.

Mr. Beals testified that he made a cruise of the timber on the claim on February 21, 1955, and this cruise showed a total of 344,050 board feet of timber with a value of $3,337.

Mr. Guglielmetti testified that he and another man had located the claim and that he later bought the man out. He also testified that at the time the claims were located the timber was not considered valuable and the mineral was in great quantity. He submitted as Exhibit 1 a five year renewable lease on this claim given to J. D. Fiske, of the K. P. F. & F. Mining Company for a consideration of twelve dollars and a 10% royalty from the proceeds on the sale of ore.

Mr. Guglielmetti stated that an engineer had taken a sample from this claim which assayed 46.30% manganese, before he became interested in the property, but that he did not have any assay certificate.. He further stated that five tons of ore had been mined, but that it later disappeared from the claims. About four tons of ore were said to be piled on the claim at the time of Mr. Sanborn's examination. No ore had ever been sold from this claim.

In his appeal Mr. Guglielmetti asserts that the claim is more valuable to him for mining than for forest purposes, that more than ten tons of ore have been extracted from the claim, that there has been discovered a vein between rock walls in place and that the discovery is sufficient to justify a reasonable belief in possible development of a paying mine.

It should be noted that the Forest Service has not sought to invalidate this claim but has contested only the application for patent. The decision of the Hearings Officer likewise went only to the question of patent, it being stated therein that although the application was rejected Mr. Guglielmetti may, so long as the lands remain unappropriated to other purposes by the government, continue his possession of the claim while he is engaged in persistent and diligent prosecution of work leading to the discovery of a valuable mineral deposit.

The question therefore presented is whether there is sufficient mineral exposed on this claim to warrant the issuance of a patent. The Department has held that, to sustain the application for mineral patent, as against persons alleging the land to be nonmineral, it must appear that mineral exists in the land in quantity and of value sufficient to subject it to disposal under the mining laws. In other words, the land applied for must be shown to contain valuable deposits of mineral, which means more than a mere discovery sufficient to support a location in the first instance. Brophy et al., v. O'Hare, 34 L. D. 596, 598 (1906). The Department must be satisfied that the land contains mineral in quantity and quality sufficient to render the land valuable for mining purposes. Cataract Gold Mining Co., et al., 43 L. D. 248 (1914).

To constitute a valid discovery, mineral must be found in such quality as would warrant a prudent man in the expenditure of his labor and means to develop a paying mine. Castle v. Womble, 19 L. D. 455 (1894).

Manganese in California, and particularly in Trinity County, where the subject claim is situated, has been the subject of an exhaustive study by a large group of geologists from the U. S. Geological Survey, This group was headed by Parker H. Trask and the results of its study are found in-Bulletin 152, of the Division of Mines of the California Department of Natural Resources, published April 1950, and Bulletin 125, published by the same agency in December 1943. As part of its study, this group examined 105 manganese properties in Trinity County. A separate report on each is found in Bulletin 152, pages 302 to 341.

Although no report is made on the Guglielmetti property, there are several on nearby areas. The American Manganese Claims No. 1 and No. 2, located in the same township and about three miles distant from the Sugar Pine Lode, are estimated to contain 3 to 5 percent manganese. Of this property the report states, "The mineral exposed in the road cut is too low grade to be of economic value as a source of manganese." Of another property examined, the Blue Ridge Deposits located in T. 1 S., R. 5 E., it was said, "Though the tonnage of manganiferous chert is large, probably in excess of 50,000 tons, the grade probably is less than 10 percent. The poorness of the grade and high iron content make the deposit unpromising." Concerning the Rattlesnake Claim, about 20 miles from the Guglielmetti property, the report stated, "The ore is manganiferous chert, containing 6 percent manganese, and considerable iron, perhaps as much as 20 percent. It lies in chert in a greenstone region. The low grade of ore and the uncertainty of the geologic relations make it an unpromising deposit." A large proportion of the manganese deposits of Trinity County were reported to have similar low percentages of manganese, and where evaluations of these claims were given, they were uniformly unfavorable.

In Bulletin 125, page 64, the Geological Survey group reported, "The manganese content of deposits of this type is generally less than 10 percent, though the iron content may be as high as 60 percent. Some of the bodies contain several thousand tons of ore, but their manganese content is so low that they are of little value. Similar deposits are found in the older rocks in Trinity County, near Hayfork (Arrowhead and Dry Lake Deposits)." Both of these claims are within 20 miles of the claim involved in the instant case. Throughout both reports high silica content was always considered to detract from the possibility of any ore deposit's utilization.

In the instant case the samples assayed showed values of manganese ranging from 0.21% to 8.95%. The average of all samples was 5.57%. Four of the samples were tested for silica content, and the results ranged from 33.72% to 64.48%, with an average of 49.63%. The only sample assayed for iron showed 20.57% of that mineral.

The overwhelming weight of the evidence indicates that although there are mineral deposits on this claim containing small amounts of manganese, these deposits are of low quality and are contaminated by large amounts of iron and silica, both of which are unfavorable to utilization of manganese ores. Accordingly, it is found that there is not exposed on this claim mineral of sufficient quantity and quality to constitute a valuable discovery nor sufficient to constitute the lands mineral lands subject to disposal under the mining laws. Therefore, the decision of the Hearings Officer rejecting the patent application is affirmed, without prejudice to the right of Mr. Guglielmetti to continue to hold these claims and to continue to develop and prospect them in hope of finding valuable minerals thereon.

Mr. Guglielmetti is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Guglielmetti then, the adverse party to be served is:

Attorney-in-Charge
Office of the General Counsel
U. S. Dept. of Agriculture
216 Federal Office Building
San Francisco, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Julius R. Guglielmetti (Certified Mail)
Attorney-in-Charge (Certified Mail)
Hearings Administrative Officer
Mr. John Sieker, U. S. Forest Service (8)
Geological Survey (3)
Minerals Staff Officer (5)
Appeals List No. 1
VJR

35615

appeal to Sec
Affirmed A-27791 1-21-59

In reply refer to:

Contest No. 5168 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 19, 1958

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant

v.

Keith V. O'Leary and
Donald K. Moore,
Contestees

Contest No. 5168 involving Kay placer mining claim in N$\frac{1}{2}$SW$\frac{1}{4}$SW$\frac{1}{4}$, N$\frac{1}{2}$S$\frac{1}{2}$SW$\frac{1}{4}$SW$\frac{1}{4}$, sec. 4, T. 8 N., R. 13 E., M.D.M., California.

Decision Affirmed

The above-named contestees have appealed to the Director, Bureau of Land Management, from a decision of Hearing Examiner John A. Wood, dated November 22, 1957, declaring null and void the Kay placer mining claim located in section 4, T. 8 N., R. 13 E., M.D.M., California.

The appellants set forth two grounds for their appeal, and accordingly consideration of the case is limited to the grounds set forth. These are as follows:

1. The Hearing Examiner designated to hold and who did hold the hearing in this case was and is without authority, jurisdiction or qualification to so act.

2. The processes laid down by statute providing for the conduct of hearings before administrative bodies of government have been ignored in this case.

As to point one, appellants urge that the Hearing Examiner, as an officer of the Bureau "is not only subservient to the will and direction of the Director, but likewise subject to the supreme direction and supervision of the Solicitor of the Department of the Interior, who in turn is an appointee of the Secretary of the Interior."

The Administrative Procedure Act (5 U.S.C., 1952 ed., sec. 1001, et seq.) provides that, "Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8 * * *." (Emphasis supplied.) The legislative history of the act clearly shows that although Congress intended an internal separation within the Department of the investigating and prosecuting from the adjudicating functions, it did not intend the establishment of a separate administrative tribunal for conducting hearings and adjudicating matters in dispute. 1/

Examiner Wood had at no time previous to the hearing participated in any way in the investigation or prosecution of this case. He has been properly appointed and certified by the Civil Service Commission, Certification S-25466, Civil Service Regulation 34.3, in accordance with the Administrative Procedure Act. The organization of the Department of the Interior does not make a hearing examiner subject to the Solicitor or to any other person who has participated in the investigation or prosecution of this case. His independence is protected and guaranteed by the retention and promotion provisions of the Administrative Procedure Act.

It has been held that "It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel. DeLuca v. O'Rourke, 213 F. 2d 759 (1954). The charges in the instant case are unsupported by any evidence that any attempt has been made by any officer of the Bureau or the Department to control the hearing examiner or to influence his decision. Accordingly, the first allegation of error is rejected.

The second allegation of error is equally unfounded. The appellants have presented no evidence, nor cited a single incident, to support their assertion that the processes laid down by statute providing for the conduct of hearings before administrative bodies of government have been ignored in this case. As has been shown above the examiner has been duly appointed according to law, and has acted independently within the framework of the internal separation of functions laid down in the Administrative Procedure Act. The present hearing was specifically ordered by decision of the Secretary of the Interior, United States v. Keith O'Leary et al., 63 L.D. 341 (1956), after a previous hearing was found to have been held without adherence to the provisions of the Administrative Procedure Act.

1/ Rep. Atty. Gen. Comm. Ad. Proc. 55 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 55 (1941).

Appellant asserts that he cannot be deprived of his claim, which is a property right, without due process of law, and that he is entitled to just compensation for the taking. In Cameron v. United States, 252 U.S. 450 (1920), the Supreme Court said:

> "* * * the land department has no power to strike down any claim arbitrarily, but so long as legal title remains in the government, it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and if it be found invalid, to declare it null and void."

In the hearing the government established a prima facie case that the land is nonmineral in character and that minerals have not been found within the limits of the claim sufficient to constitute a valid discovery. A mining claim on nonmineral land, without valid discovery, is a mere paper location, and gives the claimant no right to the land against the government. See cases cited in 30 U.S.C.A. sec. 23, note 136.

The appellants have failed to show that in any way the proceedings in the instant case were prejudicial to their legal rights or contrary to law. Accordingly, the decision of the Hearing Examiner declaring the Kay placer mining claim null and void is affirmed.

Keith V. O'Leary and Donald K. Moore are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, then the adverse party to be served is:

Regional Solicitor
Department of the Interior
Box 4291 T. and C.
Sacramento 21, California

Edward Woozley
Director

Enclosure

Distribution - Page 4

DISTRIBUTION:

Mr. Charles L. Gilmore, Attorney (Certified Mail)
Regional Solicitor (Certified Mail)
Mr. Keith V. O'Leary (Regular Mail)
Mr. Donald K. Moore (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
VJR

appeal to dec
affirmed A-27829 5-24-60
67-ID

In reply refer to:

Los Angeles 23.2
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 25, 1958

Certified Mail
Return Receipt Requested

DECISION

	:	
P & G Mining Company		Application for Restoration to Mining
	:	
	:	

Manager's Decision Affirmed as Modified

The P & G Mining Company has appealed to the Director, Bureau of Land Management, from the decision of the Manager, Land Office, Los Angeles, California, dated August 9, 1957, holding for rejection its application for restoration to mining location and entry of sec. 29, T. 13 S., R. 23 E., S.B.M., California, filed pursuant to the act of April 23, 1932 (47 Stat. 136; 43 U.S.C., 154; 43 CFR 185.36).

The basis for rejection was that the lands involved, in addition to being withdrawn for reclamation purposes, are included in the Imperial Wildlife Refuge, administered by the Fish and Wildlife Service; and that both the Bureau of Reclamation and the Fish and Wildlife Service are opposed to the restoration of the land to mineral or other type of entry.

In its appeal the appellant contends that the lands involved should be restored to mineral entry because of the minerals therein contained, in the best interest of the United States. It asserts that section 29 need not be restored in its entirety; and in the alternative, it amends its petition for restoration by offering two descriptions of tracts within section 29, embracing the area sought for restoration to mineral entry, so as to exclude the northern portion which is admittedly low and within the flood plain of the Colorado River. It also denies that opening the lands involved to mineral development would interfere with the administration of adjacent lands in the Imperial Wildlife Refuge.

Subsequent to the appeal further reports were requested from the Bureau of Reclamation and the Fish and Wildlife Service.

The Bureau of Reclamation, in a report dated November 5, 1957, stated in part:

> " * * * This is the first time the Company has indicated a willingness to reduce the area requested. The second alternative (lines 10 to 13-page 7) purportedly covers the deposits only. Mining on this area is not objectionable to the Bureau of Reclamation. * * * Our report *** is limited to Reclamation's interest in this land. * * * The Bureau of Reclamation will offer no objections to a mineral restoration * * * of the * * * /specified legal subdivisions/ of Section 29, T. 13 S., R. 23 E., SBM, California, if made subject to the following stipulations: * * *."

The Fish and Wildlife Service, Bureau of Sports Fisheries and Wildlife, in a report dated February 25, 1958, requested rejection of the appeal and, in pertinent part, stated:

> "Satisfactory administration of the Imperial Refuge to preserve the migratory waterfowl population requires a buffer zone extending back from the water and including the area applied for so as to control recreational and other ever-increasing uses along the Colorado River. Opening of these lands to mineral entry would probably lead to patenting and result in privately owned property completely surrounded by refuge lands and over which there would be no control of uses detrimental to wildlife conservation. In addition to their value in the migratory waterfowl management program, the lands covered by the appeal are quail, deer and mountain sheep habitat."

Executive Order No. 8685 of February 14, 1941, establishing the Imperial National Wildlife Refuge, does not allow mining location, entry and patent. Clyde A. Moran, Walter F. Sager, A-27489 (October 24, 1957). The Fish and Wildlife Service, under whose control the Imperial National Wildlife Refuge lies, continues to oppose the restoration application in that mining operations and probable future private ownership of the lands sought for opening to mineral entry would impair or jeopardize the use of the lands now dedicated for a special public purpose.

The lands sought for restoration to mineral entry are also withdrawn for reclamation purposes. Despite the fact that the Bureau of Reclamation now consents to restoration of these lands to mineral entry, any restoration order based upon that Bureau's consent would necessarily provide that the lands in the reclamation withdrawal order which would be restored to mineral location, entry and patent under the mining laws, would be subject to valid existing rights, provisions of existing withdrawals and specified stipulations and reservations. As a consequence, such restoration would not actually operate to open the lands to mineral entry inasmuch as the lands would remain subject to the existing wildlife refuge withdrawal made by Executive Order No. 8685. Clyde A. Moran, Walter F. Sager, supra. In the instant case, any order opening the lands in the reclamation withdrawal to mining location, entry and patent would be ineffective. Therefore, a restoration order for that purpose alone will not be issued.

The rejection of the application will preserve the land for the purposes for which the National Wildlife Refuge was created. It is in the public interest to maintain the wildlife refuge intact and protect it against piecemeal encroachments. See J. M. Mell et al., 50 L. D. 308, 310 (1924).

The appellant has asked for a hearing. Hearings are not held as a matter of course but would represent an extraordinary proceeding. As such, they should be held only if there is a reasonable likelihood that they would develop facts which would be decisive of the questions at issue. Margaret A. Andrews et al., 64 I. D. 9. A request for a hearing will be denied where there is no evidence that it would serve a useful purpose. The appellant has not shown that a hearing would develop facts decisive of the issues involved. As a consequence, the request for a hearing is denied.

Accordingly, the Manager's decision rejecting the application for restoration to mineral entry was proper, and is hereby affirmed, as herein modified, and the appellant's appeal is dismissed.

The P & G Mining Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Charles P. Mead

Acting Director

Enclosure

DISTRIBUTION:
Mr. P. T. Murphy, Attorney at Law (Certified Mail)
P & G Mining Company (Regular Mail)
Hon. Alan Bible, U. S. Senator
Bureau of Reclamation (3)
Fish and Wildlife Service, Bureau of Sports Fisheries and Wildlife (3)
Minerals Staff Officer (5); Lands Staff Officer (1)
Appeals List No. 1
WHW

In reply refer to:

M. L. # 34, 35, 36, 37, 38, 39,
40, 42, 43 (Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 26, 1958

Certified Mail
Return Receipt Requested

DECISION

Mrs. Helen Robertson	:	Mining Claims
	:	
	:	

Manager's Decision Affirmed

Mrs. Helen Robertson has appealed to the Director, Bureau of Land Management from a decision of the Manager, Land Office, Los Angeles, California, dated September 13, 1957, which rejected nine mining claim location notices filed under sec. 4, of the act of August 11, 1955 (30 U.S.C., 1952 ed., Supp. V, sec. 623).

The location notices were filed as follows:

Serial Number	Location	Filed	Name of Claim
ML-34	8/8/56	11/26/56	North Star Lode
ML-35	9/16/56	11/27/56	Lode Star No. 1
ML-36	9/16/56	11/27/56	North Star No. 1
ML-37	9/16/56	11/27/56	Lode Star No. 2
ML-38	9/16/56	11/27/56	Lode Star No. 5
ML-39	9/16/56	11/27/56	Lode Star No. 5A
ML-40	9/16/56	11/27/56	Lode Star No. 6
ML-42	9/16/56	11/28/56	Lode Star No. 3
ML-43	9/16/56	11/28/56	Lode Star No. 4

Section 4 of Public Law 359, 84th Congress states in part as follows: "The owner of any unpatented mining claim located on land described in section 2 of this Act shall file for record in the United States District Land Office of the land district in which the claim is located (1) within one year after the effective date of this Act, as to any or all locations heretofore made, or within sixty days of location as to location hereafter made, a copy of the notice of location of the claim;............"(Emphasis supplied)

In her appeal Mrs. Robertson urges reversal of the Manager's decision primarily on the ground that the location notices were timely filed in the Sacramento Land Office under a belief that the lands were within that land district.

It should be noted that although nine mining claims were involved Mrs. Robertson paid only one $5.00 filing fee, the amount specified by the Manager in his decision. By letter dated March 28, 1957, the Manager informed the appellant that a $5.00 filing fee was required for each claim and he required submission of $40.00 additional. This letter was sent by regular mail, and there is no evidence in the file of its receipt by the appellant. Since the decision served on the appellant was misleading, the appeal will not be dismissed on this ground, but will be considered on its merits. Cf. D. J. Simmons, 64 I.D. 413, (1957).

The portion of the statute cited above clearly is mandatory in requiring that the location notices had to be filed in the land office of the land district in which the claims are situated within sixty days after the dates of such locations. This requirement was not complied with by the claimant, and accordingly the location notices cannot be accepted. Solicitor's Opinion M-36429, October 30, 1957.

The location notices as filed are insufficient to identify with accuracy the lands involved in these claims, and although requested by the Manager, the claimant has failed to submit a plat or detailed descriptions more precisely identifying the claims. While claims within a power site withdrawal, for which location notices have not been submitted within the time allowed, are automatically forfeited by operation of law, Id., it is impossible to determine accurately whether any or all of these claims lie within such a withdrawal area. Because of the vagueness of the descriptions furnished neither this decision nor that of the Manager can be decisive of the issue as to which of the claims are within the power site withdrawal and are invalid for this reason.

This action is without prejudice to the right of the claimant to relocate any of the claims which are situated within the power site withdrawal, if all else is regular, and to resubmit the location notices to the proper land office within 60 days of such relocation.

The decision of the Manager is affirmed.

Mrs. Helen Robertson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulation in 43 CFR

221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:

Mrs. Helen Robertson (Certified Mail)
Minerals Staff Officer (5)
Appeals List No. 1
VJR

In reply refer to:

ML 33 (Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 26, 1958

DECISION

Mrs. Lillie Ellen Hubbert :
and :
Mr. Richard W. Hubbert : Mining Claims

Manager's Decision Affirmed

Mrs. Lillie Ellen Hubbert and Mr. Richard W. Hubbert have appealed to the Director, Bureau of Land Management, from a decision dated December 7, 1956, of the Manager, Land Office, Los Angeles, California, rejecting the location notice for the Lucky Lillie Lode Mining Claim, filed by them under section 4 of the act of August 11, 1955 (30 U.S.C., 1952 ed., Supp. V, sec. 623), and declaring the claim null and void.

The claim was located November 11, 1956, and the location notice was filed in the Land Office November 13, 1956. The lands involved are located in section 28, T. 4 N., R. 9 W., S.B.M., California. The records of the Land Office show that section 28 was withdrawn under the Federal Power Act for Power Project No. 434, August 15, 1923. The lands were also withdrawn from all forms of mineral location or entry by the act of May 29, 1928 (45 Stat. 956).

The Manager held that the 1955 act applied to lands withdrawn for power projects only and did not affect lands withdrawn for other purposes, and since the lands had been withdrawn for the Angeles National Forest under the 1928 act, the location was invalid.

The appellants do not deny any of the statements of fact or of law in the Manager's decision but they seek relief on the basis of good faith in making the location and the strong evidence of valuable deposits of uranium which they assert can be found in the lands.

The act of August 11, 1955, permitting locations for mining claims in lands withdrawn for power projects specifically provided that nothing in the act shall affect the validity of withdrawals or reservations for purposes other than power development (30 U.S.C., sec. 621(c)).

All of section 28, T. 4 N., R. 9 W., was withdrawn from location and entry under the mining laws and included in the Angeles National Forest by the act of May 29, 1928, supra. Any location on withdrawn lands is null and void ab initio.

Accordingly, the decision of the Manager is affirmed.

However, section 2 of the 1928 act provides "that the President, upon recommendation of the Secretary of the Interior and the Secretary of Agriculture, may, by Executive Order, when in his judgment the public interest would best be served thereby, and after reasonable notice has been given through the Department of the Interior, restore to location and entry under the mining laws any of the lands hereby withdrawn therefrom." This decision is therefore without prejudice to the rights of the appellants to file with the Land Office a petition for restoration of the lands in question, under the above provision of the law. The manner of filing this petition is set forth in Forest Service Form 15, December 13, 1954, a copy of which appellants submitted with their appeal.

Mrs. Lillie Ellen Hubbert and Mr. Richard W. Hubbert are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:

Mrs. Lillie Ellen Hubbert and Mr. Richard W. Hubbert (Certified Mail)
U. S. Forest Service, Pasadena, California (Regular Mail)
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Minerals Staff Officer (5)
Appeals List No. 1
VJR

37405

appeal to Sec
affirmed A-27937 7-1-59

In reply refer to:

Contest No. 5219
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 3, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	Mining Claim Contest
v.	San Pedro Extension No. Lode, located April 30, 1942, and San Pedro Extension No. 1 Lode, located March 17, 1945, in sec. 19, T. 6 N., R. 13 E., M.D.M., California, public lands of the United States.
Alice H. Feighner, Contestee,	
Lula J. Clarke, Alva A. Berry, Ted H. Berry, Protestants.	

Manager's Decision Affirmed
Protest Dismissed

Alice H. Feighner, contestee, has appealed to this office from a decision dated August 17, 1954, of the Manager, Land Office, Sacramento, California, in the matter of Contest No. 5219, holding invalid the above-identified claims on the basis that the contestant, United States, through the Bureau of Land Management, had proven the charges asserted against the claims, at the contest hearing thereon, held June 10, 1954, namely, (1) that the land embraced within the claim (or claims) is non-mineral in character; and (2) that minerals have not been found within the limits of the claim (or claims) in sufficient quantities to constitute a valid discovery. The contest hearing was scheduled pursuant to the rules of practice (43 CFR Part 222), 1/ before the Manager, Land Office, Sacramento, California, after due notice to the contestee of the charges asserted against the claims by the contestant and a general denial thereof by the contestee, with assertions by her that a valid discovery had been made of gold on the claims, in sufficient quantity to justify a person of ordinary prudence in making further expenditures of labor, time and money with the reasonable prospect of success in developing a valuable lode mine.

1/ Rules of practice amended May 1, 1956, and October 4, 1956, and incorporated into 43 CFR Part 221 (Circulars 1950 and 1962); amended further March 22, 1958 (Circular 1997).

The appellant contends in the appeal that the evidence at the hearing is insufficient to justify the Manager's decision and in fact does not establish the invalidity of the San Pedro Extension No. 1 Lode; that the examination of the claim by the contestant's witness, William L. Shafer, was superficial, the witness not having examined or sampled the discovery vein or lode of quartz upon which the mining claim was based, and because of water and weather conditions not having sampled a large vein of quartz exposed at or near the bottom of the bulldozer cut, and not having removed overburden to test or sample any of the veins of quartz and rock in place thereunder. The appellant also challenged the qualifications of the witness to testify as an expert or lay witness relative to the value and character of the mineral discovery because he admitted he had not examined the lode or vein of gold-bearing quartz in the discovery shaft in which the discovery of mineral was made at the time of location of the lode, since he was unable to go into the discovery shaft and did not attempt to take any samples of the vein of quartz therein. The appellant further asserted that the only certificate of assay which was presented at the hearing, relating to a sample taken near the surface of the claim, was not properly authenticated at the hearing, and the decision of the Manager based upon such evidence, which was fully objected to at the hearing, was erroneous to the extent it took into account this inadmissible evidence, the parties at the hearing having agreed a deposition or other proceeding would be accomplished thereafter with respect to the assay certificate. In addition, the appellant contends that the testimony of George H. Buchel, witness for the contestee and original locator of the San Pedro Extension No. 1 lode claim, involved in the contest, was uncontradicted and showed that at the time of the location of the claim a vein of quartz was discovered in the discovery shaft carrying sufficient gold to justify a prudent man to expend further effort and means in the hope of developing a valuable mine; also, that the evidence introduced at the hearing was sufficient to disclose a valid discovery of gold upon the San Pedro Extension No. 1 lode.

At the hearing held June 10, 1954, the contestant was represented by Mr. Joseph E. Taylor, Assistant to the Area Counsel, Department of the Interior, and Mr. Virgil M. Airola, Airola & Airola, Attorneys at Law, San Andreas, California, appeared for the contestee, Mr. William L. Shafer, mining engineer employed by the Bureau of Land Management as valuation engineer in mining, appeared as witness for the contestant, and Mr. George H. Buchel, prospector and miner, and original locator of the San Pedro Extension No. 1 Lode Claim, appeared as witness for the contestee. No appearance was made, however, by the contestee. The attorney for the contestee advised at the commencement of the hearing that he was appearing for the contestee with respect to the San Pedro Extension No. 1 Lode only, and it was brought out that the two locations involve essentially the same area.

The transcript of the hearing record has been reviewed, and a resume of the proceedings follows:

WILLIAM L. SHAFER testified he examined the area of the claims to determine the mineral character of the lands, identifying them from the location certificates and by means of the public survey section corner common to secs. 19, 20, 29 and 30, T. 6 N., R. 13 E., M. D. M., California, as portrayed on Contestant's Exhibit 1, a sketch map of the area depicting by green pencil outline the boundaries of the San Pedro Extension No. 1 Lode. He stated there were no corner monuments on the ground, however, that Mr. Buchel and other residents of the area designated the claim boundaries to him. The attorney for the contestee objected to the admission of the exhibit into evidence on the basis that it was not prepared by actual field survey by the witness nor did it represent a presentation of data gathered by the witness in the field. The objection is disallowed on the ground that the testimony of the witness establishes the accuracy of the claim description depicted on the sketch map and further the witness for the contestee verified the accuracy of the sketch in his cross-examination testimony.

Mr. Shafer stated he traversed the area within the perimeter of the claim in company with Mr. Buchel on April 27, 1954, and observed some openings or depressions indicating mining work done upon the claim in previous years and a recent bulldozer cut near the northerly line of the claim, as noted on Contestant's Exhibit 1. He stated he returned on April 28, 1954 for further examination of the bulldozer cut and adjacent work on the claim, and at that time he observed a small quartz vein about 14" wide in the face of the bulldozer cut, the vein having a strike about north 55° east, with a dip approximately vertical. He testified that he removed a sample of material, 6" wide, from the entire width of the vein, about two feet above the water level in the bottom of the bulldozer cut; and he stated that the vein is exposed in the bottom and the north side of the bulldozer cut, with no evidence to indicate that it could be traced either northerly or southerly from the point where it was exposed in the cut. Mr. Shafer stated he delivered the sample to Abbott A. Hanks, Inc., San Francisco, California, for assay for gold and silver, identifying it as No. 97261-1, and he identified Contestant's Exhibit 2 as a duplicate of the assay certificate which he obtained thereon. He explained that the original, signed certificate was received into evidence in connection with sample noted thereon as No. 97263-1A, in a hearing involving mineral Contest No. 5171, United States v. Calaveras Development Company. The attorny for the contestee objected to the receipt of the certificate into evidence, and the parties agreed to a continuance in order to take a deposition of the assayer with respect to the offered certificate; the continuance was had and the offered certificate was duly authenticated, as noted in page six hereof.

Mr. Shafer testified further that there is no visible evidence of mineralization in portions of the claim other than the area of the bulldozer cut, and he stated it was his observation that the area within the claim was nonmineral in character and that a prudent man would not be justified in the further expenditure of time and money in the hope of developing a paying mine.

On cross-examination Mr. Shafer stated his examination on the ground of the claim comprised approximately two hours on April 27, 1954, and six hours on April 28, 1954, and that the bulldozed spot where the sample was taken was represented to him by Mr. Buchel as the only spot where a sample could be obtained. He stated further that the sample was taken approximately six feet below the top of the cut and that no samples were taken from the bottom of the cut, which was under water. He stated Mr. Buchel told him a discovery of mineral values had been covered by the Pacific Gas and Electric Company in constructing a power line across the property; however, that he took no samples from the shaft since it was covered with a tree, brush and dirt, had no appreciable depth, and no vein was exposed for sampling. He stated also that he dug various pits, approximately 2 to 2½ feet in depth, at numerous places along the bulldozer cut, along a gulch which runs through the southwesterly portion of the claim, and at numerous spots in the old caved workings, but no samples were taken from these diggings for assay. Mr. Shafer further testified that he examined the lands in each location, and that they are approximately the same area, surrounded by mining locations and patented mining claims, and situated in an area which was mined extensively in past years.

On redirect examination he testified that the past mine workings on the claim being completely caved and inaccessible, covered with brush and vegetation, would indicate that possibly 5 to 10 years had transpired since they had been active. He stated there were no visible evidences within the banks, or at any place he cut within the banks, of any quartz vein or lode. He reiterated that the sample taken at the recent bulldozed cut was taken 6 inches above the water surface, also that the only vein or exposure of quartz observed within the claim was that appearing on the north side of the bulldozed cut, from which the sample was taken.

The attorney for the contestee offered the following into evidence and they were received without objection: (1) Contestee's Exhibit A, a certified copy of the recorded location notice of the San Pedro Extension No. 1 Lode mining claim, located by George H. Buchel on March 17, 1945; (2) Contestee's Exhibit B, a certified copy of recorded statement of markings of boundaries and performance of required discovery work, dated June 9, 1945; (3) Contestee's Exhibit C, a certified copy of quitclaim deed to the San Pedro Extension No. 1 lode, executed January 17, 1948, from George H. Buchel to F. B. Feighner; and

(4) Contestee's Exhibit D, a certified copy of recorded order and judgment dated August 8, 1951, establishing the death of Fred B. Feighner and the termination of his estate as joint tenant in certain real property, including the San Pedro Extension No. 1 Lode, and assigning the estate to his surviving widow, Alice H. Feighner.

GEORGE H. BUCHEL, prospector and miner for approximately 22 years, testified that he located the San Pedro Extension No. 1 Lode after having discovered a quartz vein at a depth of 10 to 12 feet, yielding a string of gold approximately a quarter of an inch in length from grinding of a rock sample approximately one or two pounds in weight and approximating the size of a man's fist. Based upon this recovery he estimated such ore would run $8 to $10 a ton. He stated he posted the notice of location on a tree by the discovery hole and placed a stake at the southwest corner of the San Pedro (the northwestern corner of the San Pedro Extension No. 1); he identified the southwest corner of the claim as the point where the claim joins the Bismarck placer, the southeast corner of the claim as the place where the claim joins the Bismarck placer and the Banner lode, and the northeast corner where the San Pedro Extension No. 1 joins the San Pedro. He stated he observed a blind vein on the San Pedro Mine, in a northwest and southeast direction and approximately 150 feet from the San Pedro Extension No. 1, and he believes the same vein extends through the San Pedro Extension No. 1 lode. He stated his discovery work on the San Pedro Extension No. 1 was about 35 feet from the end line of the San Pedro and having encountered a vein in the discovery shaft which yielded a string of gold, he concluded there is a possibility of developing the mine, stating as long as there is gold there further efforts to see whether it increases would be justified. He testified that the mineral values in the area increased at depth and that the country rock and formation in the San Pedro Extension No. 1 lode, similar to the other claims in the area, were situated beneath an overburden of 5 to 6 feet of earth.

Mr. Buchel further testified as to the existence of blind veins in the adjoining Banner Mine, from which good pay rock had been extracted, and he stated that these blind veins also bear toward the San Pedro Extension No. 1, in a northwest to southeast direction though not at as sharp an angle as the San Pedro. He testified also that a small excavation below the reservoir on the San Pedro Extension No. 1 approximately 300 feet from the discovery shaft produced rock which yielded a good string of gold, however, that the rock appeared to be float rather than rock in place. He stated his belief that the vein discovered in the bottom of the discovery shaft was a continuation of the San Pedro, with contact at the Banner lode. He stated further that Mr. Feighner had shown him a gold recovery of 3/4" in the string which he represented had been taken from a lead going into the big reservoir, which would intersect the main vein, and he described a bulldozer cut "practically at the Banner line" as disclosing gold color but no gold particles sufficient to make a string. In brief, he stated the places on the claim that he knew of his own personal knowledge which carried gold values are the point of discovery and the excavation by the reservoir. He stated that the construction of the power line by the Pacific

Gas and Electric Company more or less filled up the point of discovery, and he attempted to reopen the hole with a bulldozer approximately two years ago, reaching a depth of approximately six feet, where a streak of quartz was encountered. He stated the vein in the discovery shaft where the initial discovery was made, showing values approximating $8 to $10 a ton, was at a depth of 12 feet, and while he could not be sure the vein exposed in the bulldozer cut at the 6 foot level is the same quartz vein discovered in the bottom of the shaft, he presumes they are the same since they are so close. He testified that the development work on the claim was at the point of discovery and in a bulldozer cut by the Banner claim.

Upon cross-examination Mr. Buchel identified the Contestant's Exhibit 1, sketch map of the claim, as an accurate portrayal of the boundaries of the claim. He stated no assays were made of rock samples taken from the claim by him, that his estimate of the value of $8 to $10 a ton was based upon visual inspection of gold obtained from grinding of a rock sample the size of a man's fist. He stated the vein exposure as shown on the Contestant's Exhibit 1, in the bulldozed cut near the north line of the claim, is accurate; that there was no exposure of a vein in the bulldozed cut near the Banner claim, float quartz material only being present there. He stated this float material was present also in the area near the reservoir; that he had not found an intersecting vein at that point but Mr. Feighner had represented to him that he had and had shown him a sample of material alleged to have been found there. He stated the width of the vein in the discovery shaft at the point which is exposed presently is as expressed by contestant's witness Shafer, about 14 inches, though he believes it is a bit longer at the bottom of the discovery shaft. Mr. Buchel stated he believed the claim had value as a mining property for gold when he sold it to Mr. Feighner.

Pursuant to the request of the attorney for the contestant that the hearing be continued for the purpose of obtaining the deposition of the assayer, with respect to the Contestant's Exhibit 2, with which request the attorney for the contestee was in accord, the record was remanded in January 1956 for the purpose of obtaining the required authentication of the exhibit. The taking of the statement of the assayer was duly scheduled for July 31, 1956, before Field Commissioner Graydon E. Holt, Room 539, 630 Sansome Street, San Francisco, California. The attorney for the contestant appeared with witness Charles J. Taylor, Chief Assayer for Abbot A. Hanks, Inc., San Francisco, which firm prepared the Contestant's Exhibit 2, offered in the original hearing in this contest before the Manager of the Land Office, Sacramento, California. No appearance was made by or in behalf of the contestee. Mr. Taylor testified he was employed as assistant assayer for the company in April and May 1954, making assays for gold, silver and platinum on samples submitted to the company, and that he is familiar with the record-keeping procedure of the company with respect to receipt and handling of samples delivered for assay. He testified the records of the company show a sample marked 97261-1 was received from the Bureau of Land Management on April 30, 1954, for assay for gold and silver; the sample was also identified by a number assigned to it by the assayer, No. 67444. The witness described the method employed by the company in assaying the sample, and he stated the results obtained were gold content of .005 Troy ounces per ton of 2,000 pounds, having a value of 17 cents per ton, and silver content none. He identified the results shown on Contestant's Exhibit 2 relating to the sample referred to by laboratory No. 67444 and mark 97261-1 (BLM), as correctly reporting the results of assay of sample bearing these numbers, as reported by Abbott A. Hanks, Inc.

The record was remanded to the State Supervisor for this Bureau in California in August 1957 for further examination of the claim to afford the mineral claimant every reasonable opportunity to show the mineral values which she claimed exist in the claim and thereby to assemble necessary data upon which to resolve the issues on appeal. Mrs. Feighner was therefore allowed a reasonable period of time to reopen the discovery shaft on the claim and to make available for examination such other places on the claim as she wished. She had notified this office in May 1957 she was no longer interested in the mining claim; however, subsequently she advised us she did not intend to withdraw her appeal, and she wished to proceed with the proposed further examination of the claim through her agent, Mr. Alva A. Berry.

The complete record, with an approved report of the supplemental examination of the claim, has been returned to this office. The report shows the supplemental examination was made by Valuation Engineer (Mining) Alan A. Sharp, of this Bureau, in company with Mr. Berry on January 15, 1958; and the following two days by Mr. Sharp alone. The report shows no attempt was made to reopen the discovery shaft (although Mr. Berry stated he had intended to do so); but a deeper exposure had been made of the vein previously sampled by Valuation Engineer Shafer by a side cut in the bank measuring 3 feet in width by 4 feet high and 2 feet deep. The report shows additional recent improvements on the property as follows: Adjacent to the reservoir, an L-shaped trench 20 feet long on one arm and 7 feet on the other arm by 2 feet in width, and 3 feet to 8 feet in depth, partly filled with water on the end nearer the reservoir; Near the southwest corner of the claim, a cut 10 feet long by 3 feet high in the face and 2 feet wide; and Nine post holes dug to depths of 5 feet to 7 feet in the area west of the trench. A total of nine samples were taken, as indicated below. They were tested by Morse Laboratories, Sacramento, California, for gold, platinum, uranium, and rare earths (alleged to be contained therein by Mr. Berry), and a spectographic analysis on the composites of the gravel samples combined and of the lode samples combined was made, with the following results:

Identification	Weight of sample as rec'd	Moisture	Value of gold/cu yd 3000# dry, 910 fine	Platinum
SP 1	24.7#	25%	9.9 cents	None
SP 2	7.6	16	7.5 "	"
SP 3	7.1	15	5.0 "	"
SP 4	8.8	12	15.6 "	"
SP 5	36.8	33	2.3 "	"
SP 6	12.5	30	4.6 "	"

(These samples taken from a portion of the claim in lot 26).

Composite of
Samples SP 1 - 6,
inclusive:

Rare Earths	None present
Uranium	None present
Spectrographic analysis	As follows:

Less than .03%	.03% to .30%	.30% to 3%	3% to 30%	30% to 100%
Nickel	Chromium	Calcium	Aluminum	Silicon
Zirconium	Titanium		Iron	
Strontium	Sodium		Magnesium	
Vanadium	Manganese			
Cobalt				
Copper				
Lead				
Boron				
Silver				

Identification	Gold	Platinum
SP 7	None	None
SP 8	"	"
SP 9	"	"

(These samples taken from a portion of the claim in lot 20).

Composite of Samples
SP 7, 8 & 9:

Rare Earths	None present
Uranium	None present
Spectrographic Analysis	As follows:

Less than .03%	.03% to .30%	.30% to 3%	3% to 30%	30% to 100%
Manganese	Calcium	—	Aluminum	Silicon
Strontium	Magnesium		Iron	
Vanadium	Sodium			
Copper	Potassium			
Zirconium	Titanium			
Nickel	Molybdenum			
Cobalt				
Chromium				
Boron				
Silver				

From this report it appears that the values in gold were negligible and that no platinum, rare earths, or uranium were reported on any of the samples. The spectographic analysis on the gravel composite reveals the material is primarily an aluminum, iron, magnesium silicate, and the lode-sample analysis places the rock in the category of an aluminum-iron silicate. No significant amounts of any elements were reported, as most of the elements were in the group of less than 0.03%.

Under the United States mining laws a valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim (30 U.S.C., 1952 ed., sec. 22). The discovery of a vein or lode is a prerequisite to the location; there must be actually and physically exposed within the limits of the claim a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining. East Tintic Consolidated Mining Company, 40 L. D. 271 (1911). It is not until minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine that the requirements of the law have been met. Castle v. Womble, 19 L. D. 455 (1894). The same standard has been applied by the Supreme Court of the United States. Chrisman v. Miller, 197 U. S. 313 (1905); Cameron v. United States, 252 U. S. 450 (1920). As noted by the Manager in his decision of August 17, 1954, the Department in the case of Jefferson-Montana Copper Mines Co., 41 L. D. 320 (1912) outlined the elements essential to establish a valid discovery on a lode claim as follows: "(1) There must be a vein or lode of quartz or other rock in place; (2) The quartz or other rock in place must carry gold or some other valuable mineral deposit; (3) The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine."

From the testimony presented at the hearing and outlined with particularity herein, as well as the results of the supplemental examination of the claim, it is evident that there has been no valid discovery on the claim. The values shown in the samples which were taken from the claim and assayed are so low that a prudent person would not be justified in expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Such showing of traces of minerals in the lands is also insufficient to warrant a classification that the lands are mineral in character. The contestee having shown no more than that it is possible to detect the presence of some minerals in the material removed from the claim did not show, at the hearing, or in the supplemental examination, the discovery of valuable mineral deposits in a vein or lode within the limits of the claim. She did not therefore meet the charges brought against the claim.

By letter dated November 26, 1954, and in subsequent correspondence, Alva A. Berry and Lula J. Clarke of Stockton, and Ted H. Berry of Pine Grove, California, protested the Manager's ruling that the lands in the contested claim are nonmineral in character. They stated in substance that the contested claim is the south extension of the old, original San Pedro Mine, of which they are the present owners, and they consider it similar in character to the old San Pedro Mine. They stated their belief that the San Pedro ledge extends through the contested claim, and Mr. Alva A. Berry stated that he opened a prospect on the contested claim while Mr. Feighner was living and found pay gravel estimated at $12 to $15 a yard, that the site of this discovery is presumed to be the area where witness Buchel testified as to the existence of a quartz vein on the claim, but its exact location is lost, that a recent discovery of uranium has been made on the contested claim; and that a recovery in zinc showing values of $8.50 per ton, as well as other mineral values, has also been made. The protestants presented also for consideration in connection with their protest certain data re assay results of samples taken from the San Pedro mine, adjoining the contested claims. Mr. Berry stated he wished to testify at the contest hearing but was unable to do so because of illness, and he wishes a rehearing in the matter to permit him to testify in behalf of the contestee. The protestants urged that the lands in the contested claims be classified as mineral in character and that a small tract application which involves portions of the San Pedro mine and of the contested claims, Sacramento 044769 of Mr. Raoul Cyr, be rejected. Since the protestants are not parties to the contest proceedings, nor have they entered into the proceedings as interveners, they are not entitled to seek a rehearing in the matter of the contest. However, the showing submitted by them in support of the protest has been reviewed. It is considered that the unsupported statements therein as to mineral values in the contested claims and as to the purported existence of an extension of the San Pedro ledge in the contested claims are insufficient upon which to base a determination that such values or such lode exist in the claims. The property involved in the contest has been examined thoroughly, and every reasonable opportunity has been given the contestee and her agent, Mr. Berry, to present evidence to support their contentions that the lands are mineral in character and that a valid discovery of valuable mineral was made. No showing has been presented by or in behalf of the contestee which would warrant scheduling of a rehearing. The request for rehearing is therefore denied, and the protest is dismissed to the extent it affects the issues in this contest. The protest will be considered further, however, in the disposition of the small tract application Sacramento 044769 to the extent the San Pedro mining claim and the small tract application both affect a portion of the same public lands, Lot 20 sec. 19, above township and range.

On the basis of the entire record it is concluded that the contestant has proven the charges asserted against the claim, namely, that the land within the claim is nonmineral in character and a valid discovery of a valuable mineral deposit has not been made within the limits of the claim. The claim is therefore null and void, and the action of the Manager in declaring it invalid is affirmed.

When this decision becomes final the contestee will be allowed a reasonable period of time within which to remove her improvements from the claim.

Mrs. Feighner is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mrs. Feighner, then the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 291 - T&C
Sacramento 21, California.

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:

Mr. Virgil M. Airola, Attorney for Contestee (Certified Mail-RRR)
Mrs. Alice H. Feighner (Regular Mail)
Mrs. Lula J. Clarke (Certified Mail-RRR)
Mr. Alva A. Berry (" ")
Mr. Ted H. Berry (" ")
Mr. Joseph E. Taylor, Ass't. Regional Solicitor, Sacramento, Calif.
Hearing Examiner Graydon E. Holt, Portland, Oregon
Hearings Administrative Officer
Hon. Clair Engle, Member of Congress
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Appeals List No. 1
FAP

appeal to Sec
affirmed A-27796 1/30/59

In reply refer to:
Los Angeles 0146410
0147709
0147711
0151389
0151390
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 11, 1958

Certified Mail
Return Receipt Requested

DECISION

Victorville Lime Rock Company,
Claimant

Mineral Application

George W. Veale, et al.,
Adverse Claimants

Manager's Decision Affirmed

Victorville Lime Rock Company has appealed to the Director, Bureau of Land Management, from two decisions of the Manager, Land Office, Los Angeles, California, accepting the filing of notice of adverse claims by George W. Veale et al., and staying patent proceedings in mineral applications Los Angeles 0146410, 0147709, and 0147711.

On April 12, 1957, George W. Veale, Elick M. Bowler, August W. Bowler, Wilbur C. Veale, Cliff C. Hamblen, and Harry Pike filed notices of protest and adverse claims against mineral patent applications Los Angeles 0147709 and 0147711 of the Victorville Lime Rock Company. The notice was accompanied by an affidavit, under oath and signed by George W. Veale, though each protestant did not make his statement under oath.

By decision of May 14, 1957, the Manager allowed the protestants an additional 30 days to file the following additional proof:

1. Proof of the authority of George W. Veale to act as agent or attorney for all the claimants in swearing to the statements in the protest;
2. A statement of the nature and extent of the conflict, and such evidence of title as required by 43 CFR 185.79 (a);
3. A plat showing the relative positions of the conflicting claims in accordance with 43 CFR 185.79 (b).

On June 10, applicants filed the required papers including an affidavit signed by all six adverse parties asserting under oath that George W. Veale acted as their agent in submitting the adverse claim on April 12, and they declared that the previous statements were true and were reaffirmed. The adverse claims were designated by serial numbers Los Angles 0151389 and 0151390.

By decision of June 18, 1957, the Manager accepted the notices of adverse claims and stayed patent proceedings on patent applications Los Angeles 0147709 and 0147711. This decision was amended by a decision of July 12, 1957, which stayed patent proceedings in application Los Angeles 0146410, because part of the lands embraced therein were also determined to be in conflict with the lands involved in the adverse claim.

In its appeal the Victorville Lime Rock Company asserts that because of formal defects there has been no valid adverse claim filed during the period of publication. This argument is based on the failure to make the charges under oath of each of the claimants, and on their failure to submit all the necessary accompanying documents also under oath.

It has been held that a coowner may verify an adverse claim for himself and the joint claimants. Nesbitt v. DeLamar's Co., 53 Pac. 178. Furthermore in Anchor v. Howe, 50 Fed. 366,367 (1892) the court stated:

> "The most apparent, if not the only, object of this statute is that the applicant for patent may have a definite notice of what is claimed against him, which he may then concede or contest. Any adverse claim, apparently made in good faith, and which clearly and definitely notifies the applicant for patent of the conflict between his and the adverse mining claim, would seem to meet and comply with the object of the statute, and certainly would be sufficient to so put in issue the question of contest that the interest of all parties could be protected by the courts."

Measured by this standard, it is clear that George W. Veale et al. have met the requirements of the law in promptly filing their adverse claim, and the stay of proceedings ordered by the Manager, pending determination of the controversy by a court of competent jurisdiction, was proper.

While it is not argued in the appeal, the Victorville Lime Rock Company has submitted certificates by the clerk of the United States District Court for the Southern District of California, and by the clerk of the Superior Court of San Bernardino County, California, each asserting that no action has been commenced in that court on or subsequent to June 10, 1957 against the Victorville Lime Rock Company. In the original protest, George W. Veale asserted, under oath, that on April 8, 1957, an action to determine the validity of these claims was filed in the Superior Court, San Bernardino County, California, Case No. 88727. The statute states:

> "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession ***"

While the adverse suit in this case apparently was not instituted subsequent to the perfecting of the protest on June 10, it has been held that "when a suit is already pending between the same parties for the recovery of the ground in conflict at the time of the filing of the adverse, *** such suit may stand as a suit to support the adverse and no new suit need be brought." *McMullin* v. *Magnuson*, 78 Pac. 2d, 964 (1938). See also *Northwestern Lode and Mill Site Co.*, 8 L.D. 437 (1889). Accordingly, it is found that if George W. Veale *et al.*, can show, by certificate of the court clerk, that on April 8, proceedings were instituted in Superior Court, San Bernardino County, to determine the question of the right of possession, such a suit will be sufficient basis on which to suspend action on the patent application pending termination of the court proceedings.

Accordingly, the decisions of the Manager are affirmed, as amended.

Victorville Lime Rock Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If appeal is taken, the adverse parties to be served are:

George W. Veale *et al.*
c/o Hyer, Graeber & Smith
Attorneys at Law
392 Court Street
San Bernardino, California

Earl J Thomas
Acting Director

Enclosure

DISTRIBUTION:

Victorville Lime Rock Company (Regular Mail)
Mr. John B. Lonergan, c/o Lonergan & Jordan, Attorneys at Law (Certified Mail)
Hyer, Graeber & Smith (Certified Mail)
George W. Veale (Regular Mail)
Elick M. Bowler (Regular Mail)
August W. Bowler (Regular Mail)
Wilbur Veale (Regular Mail)
Harry Pike (Regular Mail)
Cliff Hamblen (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
VJR

In reply refer to:
Contest No. 6-721
(Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 17, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	:	
v.	:	Lode Mining Claims
F. O. Stenberg, et al., Contestees (Appellants)	:	

Hearings Officer's Decision Affirmed

F. O. Stenberg for himself and in behalf of his mother, Mrs. B. O. Persson, heir of B. O. Persson, deceased, has appealed from a decision of Hearings Officer, Graydon E. Holt, dated May 16, 1956, declaring null and void the Iron Hill Extension and Myrickite Bloodstone Nos. 1, 2 and 3 lode mining claims for lack of a valid discovery. The claims are all situated in T. 26 S., R. 46 E., M.D.M., San Bernardino County, California.

The proceedings were based upon the charges: (1) that the land embraced within the limits of the claims is nonmineral in character; and (2) that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

On appeal the contestees request a hearing to present evidence to substantiate the validity of their claims. At the same time they assert a vein or lode exists on the claims and there is radioactivity in the crustation adhering to the rock.

The material facts adduced from the testimony at the hearing have been thoroughly summarized in the Hearing Officer's decision and need not be repeated.

It has been consistently held that a mining claim is not valid unless there has been an actual discovery on the claim of valuable minerals in such quantity and of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine. Castle v. Womble, 19 L.D. 455 (1894).

The mineral examiner for the contestant, who examined these claims, testified that he found no mineralization on the Iron Hill Extension lode mining claim. The rebutting testimony of the contestees, which included Exhibits A-1, A-2, B and C (samples), it was shown and later admitted, referred to a claim not here involved. Obviously, this was insufficient to counteract the contestant's prima facie case as to the Iron Hill Extension claim. Therefore, the Hearings Officer's conclusion that the charges against that claim have been proved is correct.

In regard to the Myrickite Bloodstone Nos. 1, 2 and 3 lode mining claims, the contestant's mineral examiner testified he found in the volcanic ash seams, nodules and lenses containing opal and opalite. These were fractured and cracked to the extent of impairment of quality as gem material in that it resulted in splintering. Against this evidence, the contestee offered unsupported statements that the cracks add beauty to the material; that he was told that opal and opalite is sold at 85 cents a square inch; and that it is usable as an abrasive. Standing alone, however, they are mere self-serving declarations, insufficient to overcome the contestant's evidence. Further, the same mineral examiner testified that igneous rocks such as rhyolite and volcanic ash contain some radioactive minerals and it is possible to have a higher reading than the ordinary background count from those substances (tr. 88), but the concentration is not such as would render the material valuable (tr. 89). At the hearing the contestees presented no evidence to refute this testimony, except the unsupported statements of the contestee that the material was radioactive. Consideration of the radioactivity analysis of the exhibits made after the hearing requires the elimination of Exhibits A-1 through C, since they relate to specimens from a claim not involved in these proceedings. There remain Exhibits D and E, reported to contain a negligible amount of radioactivity. The percentages indicated for these exhibits appear speculative. It is concluded that the Hearings Officer's finding that the charges against these claims have been proved, was proper.

Consideration has been given to the appellants's request for a further hearing. What is proposed for introduction at a new hearing has not been disclosed. The hearing heretofore held afforded ample opportunity to the parties to present any evidence they desired to establish the validity of their claims. They were on notice that the contestant considered their claims were invalid for lack of discovery, and it was their responsibility, if they claimed to the contrary, to present evidence at that time to prove a discovery of valuable minerals. In the absence of any disclosure by the appellants as to what further data they may have for submission at a new hearing, it appears there is no reasonable likelihood that a supplemental hearing would develop further facts which would require a different conclusion in this matter. The request is therefore denied.

Accordingly, the Hearing Officer's decision declaring null and void the Iron Hill Extension and the Myrickite Bloodstone Nos. 1, 2 and 3 lode mining claims is affirmed.

The record discloses that each of these claims was located by 8 persons. L. L. Harmon, Lucia Harmon and U. S. Swisher, whose addresses are unknown, were not served with notice of the proceedings. Therefore, the conclusions reached affect the interest in the claims only of the 5 persons served. Of these, 3 have defaulted by reason of failure to answer or to appear. In order to obtain a ruling with respect to the interests of the claimants who were not served, the Manager of the Land Office at Los Angeles is directed to initiate new proceedings against these claims as to the omitted parties, with service of notice thereof upon these parties by publication.

Mr. F. O. Stenberg and Mrs. B. O. Persson are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Stenberg and Mrs. Persson, then the adverse party to be served is:

Regional Solicitor
United States Department of the Interior
620 Rowan Building, 458 South Spring Street
Los Angeles 13, California.

Charles P. Mead

Acting Director

Enclosure

Distribution:

Mr. F. O. Stenberg (Certified Mail)
Mr. B. O. Persson (Certified Mail)
Regional Solicitor, Department of the Interior, Los Angeles (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer (1)
Hearings Examiner, Graydon E. Holt (Regular Mail)
Appeals List No. 1
WHW

39080

In reply refer to:
Sacramento PL 7-13
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 6, 1958

Certified Mail
Return Receipt Requested

DECISION

:
John M. Sheedy : Mining Claims
:

Decision Affirmed

Mr. Sheedy has appealed from a decision rejecting his verified statement submitted under section 5 of the Act of July 23, 1955 (30 U.S.C. sec. 613(a); P.L. 167). The statement was rejected for the reason that it was not timely filed within the 150-day statutory period after the first publication. The first publication was on February 7, 1957; the 150th day thereafter was July 7, (a Sunday). The statement was filed on July 9.

The appellant contends that since the statement was deposited in the mails within the 150-day period, it should be accepted as timely filed.

The Multiple Use Act of July 23, 1955, supra, provides, with respect to invalid, abandoned, or dormant mining claims, located prior to the enactment of the act, an in rem procedure in the nature of a quiet title action, whereby the United States may expeditiously resolve uncertainties as to surface rights on such locations. In pertinent part, section 5 provides that the head of the Federal Department or agency, having administrative responsibility of the lands involved, may file with the Secretary of the Interior a request for publication of notice to mining claimants for the determination of surface rights to a described area, and that the persons affected, if known, will be named and in certain instances served with a copy of the publication. Section 5(b) provides that any person asserting possessory title to an unpatented mining claim in the lands involved would be required to submit, within 150 days from the date of first publication, a statement setting forth pertinent information as to his claim. The law thus specifies a maximum time for assertion of rights to the lands involved by claimants. Under the mandatory provisions of section 5(a) of the law, the claimant was required to file his verified statement "in the office where such request for publication was filed (which office shall be specified in such notice)." Circular 1961 (43 CFR 185.126 and illustrated form #2 attached thereto), published in the Federal Register on October 4, 1956, (21 F.R. 7619), was promulgated in accordance with the statute and requires that the statement be filed in the land office. The address of the land office is furnished in the notice of publication. Failure to file the required statement within the time limit prescribed by statute, and as implemented by Circular 1961, is conclusively deemed to be a waiver and/or relinquishment and a consent to subject the claim to the restrictions of section 4 of the Act of July 23, 1955, *supra*. For failure to file the statement within the established time limit, the claimant is precluded from asserting any rights contrary to section 4 which may have been established otherwise under the general mining laws prior to the enactment of the Act of July 23, 1955.

In the instant case the statement required by section 5 of the Act was not received by the appropriate land office within the prescribed 150-day period. The statutory requirement that it be filed within that time is mandator and may not be waived by the Department. Nor may the appellant's required verified statement be considered as having been filed at any earlier time than when actually received "for a paper is considered filed only at a time when it is actually delivered to and received by the office concerned." *H. P. Saunders, Jr.*, 59 I.D. 41.

The Manager's decision holding that the verified statement was unacceptable was correct and in accord with the law and the regulations. Therefore, his decision is affirmed.

Mr. Sheedy is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. John M. Sheedy (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, Forest Service, Department of Agriculture (8)
Appeals List No. 1
BF

In reply refer:

Sacramento PL 2-40
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 15, 1958

DECISION

Willis S. Davis	:	Mining Claim
	:	Verified Statement under
	:	sec. 5 of the Act of
	:	July 23, 1955 (P.L. 167)
	:	

Decision Reversed; Case Remanded

Willis S. Davis has appealed from a decision rejecting his verified statement, filed pursuant to the Act of July 23, 1955 (30 U.S.C. sec.613 (a)), because it was not filed within 150 days from December 6, 1956 (the date of first publication).

The notice required to be sent to the mining claimant under the cited law was duly served upon the appellant. That notice was returned to the Land Office on March 8, 1957, with longhand answers to the pertinent questions, signed and sworn to by the appellant. Thereafter the Land Office forwarded Mr. Davis the form in use within the Bureau for furnishing such verified statements. This form was returned also, duly executed, but more than 150 days after December 6, 1956.

The Act of July 23, 1955, requires the mining claimant to file a verified statement containing certain information within 150 days from first publication in order that certain of his rights in the land may be protected. No specific form is required for that statement either by statute or regulation. It follows that the longhand verified statement filed by the claimant, was sufficient and acceptable when filed. Therefore, the decision appealed from is reversed. The case is being remanded for such further proceedings as may be indicated in the premises.

Thomas
ActingDirector

DISTRIBUTION:
Willis S. Davis (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, FSUS Dept. of Agriculture (8)
Appeals List No. 1
BF

In reply refer to:

Los Angeles PL 2-47
PL 2-48

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 21, 1958

Certified Mail
Return Receipt Requested

DECISION

Robert A. Mindte, :
Jewell F. Mindte, : Mining Claims
Hugh A. Mindte, and :
Robert T. Mindte. :

Decisions Affirmed

The above-named individuals have appealed from decisions rejecting their verified statements under section 5 of the Act of July 23, 1955 (30 U.S.C. sec. 613 (a)). The statements were rejected for the reason that they were not timely filed within the 150-day day period after the first publication. The first publication was on May 10, 1957. October 7, 1957, was the 150th day thereafter and the last day in which to timely file the verified statements. The appellants filed the statements on October 8, one day late.

It is contended on appeal that the Act was not enacted for the purpose of the United States' taking of control of the surface of lands within legitimate mining claims but to clear the lands of invalid, abandoned or fraudulent mining claims; further, that the mining claims involved in the appeals are all legitimate claims and should not be disturbed. The appellants contend that the verified statements were mailed on October 7th and therefore should be accepted although actually filed one day late.

The Multiple Use Act of July 23, 1955, supra, provides, with respect to invalid, abandoned, or dormant mining claims, located prior to the enactment of the act, an in rem procedure in the nature of a quiet title action, whereby the United States may expeditiously resolve uncertainties as to surface rights on such locations. In pertinent part, section 5 provides that the head of the Federal Department or agency, having administrative responsibility of the land involved, may file with the Secretary of the Interior a request for publication of notice to mining claimants for the determination of surface rights to a described area, and that the persons affected, if known, will be named and in certain instances served with a copy of the publication. Section 5(b) provides that any person asserting possessory title to an unpatented mining claim in the lands involved would be required to submit, within 150 days from the date of first publication, a statement setting forth pertinent information as to his claim. The law thus specifies a maximum time for assertion of rights to the lands involved by claimants. Under the mandatory provisions of section 5(a) of the law, the claimant was required to file his verified statement "in the office where such request for publication was filed (which office shall be specified in such notice)." Circular 1961 (43 CFR 185.126 and illustrated form #2 attached thereto), published in the Federal Register on October 4, 1956, (21 F.R. 7619), was promulgated in accordance with the statute and requires that the statement be filed in the land office. The address of the land office is furnished in the notice of publication. Failure to file the required statement within the time limit prescribed by statute, and as implemented by Circular 1961, is conclusively deemed to be a waiver and/or relinquishment and a consent to subject the claim to the restrictions of section 4 of the Act of July 23, 1955, supra. For failure to file the statement within the established time limit, the claimant is precluded from asserting any rights contrary to section 4 which may have been established otherwise under the general mining laws prior to the enactment of the Act of July 23, 1955.

In the instant case the statement required by section 5 of the Act was not received by the appropriate land office within the prescribed 150-day period. The statutory requirement that it be filed within that time is mandatory and may not be waived by the Department. Nor may the appellants' required verified statements be considered as having been filed at any earlier time than when actually received "for a paper is considered filed only at a time when it is actually delivered to and received by the office concerned." H. P. Saunders, Jr., 59 I.D. 41.

The Manager's decision holding that the verified statements were unacceptable was correct and in accord with the law and the regulations. Therefore, his decision is affirmed.

The parties above named are allowed the right of appeal to the Secretary of the Interior in accordance with the regularions in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regularions.

Carl J Thomas

Acting Director

Enclosure

DISTRIBUTION:

Mr. George W. Nilsson, Attorney at Law (Certified Mail)
Mr. Robert A. Mindte (Regular Mail)
Mrs. Jewell F. Mindte (Regular Mail)
Mr. Hugh A. Mindte (Regular Mail)
Mr. Robert T. Mindte (Regular Mail)
Minerals Staff Officer (5)
Mr. John Sieker, Forest Service, Dept. of Agri. (8)
Geological Survey (3)
Appeals List 1
BF

appeal to Sec
affirmed A-27906 12-29-59

In reply refer to:
Contest #5227 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 25, 1958

Certified Mail
Return Receipt Requested

DECISION

United States
v.
Quenton L. Brewer and
Bertel A. Anderson

: Sand Placer Mining Claim

Decision Affirmed; Claim Declared Null and Void

Quenton L. Brewer and Bertel A. Anderson have appealed from the decision of the Manager of the Land Office, Sacramento, California, dated October 13, 1954, wherein he held for rejection appellants' application for patent to the Alder Gulch sand placer mining claim after hearing upon adverse charges brought against the claim by the United States Forest Service, Department of Agriculture.

The Alder Gulch claim is located near Lake Tahoe in the S½SE¼NW¼, N½NE¼SW¼ sec. 32, T. 14 N., R. 17 E., M.D.M., California, within the Eldorado National Forest.

The Forest Service charged that (1) the land embraced within the claim is nonmineral in character; (2) minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery; and (3) the land is more valuable for national forest purposes than for mining. The manager found all of the charges were sustained by the evidence and therefore held the patent application for rejection. We have considered all of the arguments advanced by appellants, but from our review of the record made at the hearing we are led to conclude, for the reasons set forth below, that the lands are nonmineral in character and since the appellants have not discovered within the limits of their claim a valuable mineral deposit within the meaning of the mining laws, in addition to rejection of the mineral patent application, the claim must be declared null and void.

Under the mining laws only valuable mineral deposits in the public lands of the United States are open to exploration and purchase and the lands on which they are found are open to occupation and purchase except as they may have been withdrawn or reserved for other purposes and except as other provisions may have been made for their disposition (30 U.S.C., 1952 ed., sec. 22). While the lands remain open and until other rights have attached thereto, the discovery of a valuable mineral deposit within the limits of a claim will validate the claim (30 U.S.C., 1952 ed., secs. 23, 35) if other requirements of the law have been met.

In order to satisfy the requirements of discovery on a placer mining claim located for sand 1/ it must be shown that the deposit can be extracted, removed and marketed at a profit. This includes a favorable showing as to the accessibility of the deposit, bona fides in development, proximity to market, and existence of a present demand for the sand. United States v. Everett Foster et al., 65 I.D. 1 (1958). Since the Alder Gulch claim is situated in a national forest, the evidence sustaining the validity of the location must be clear and unequivocal. United States v. Dawson, 58 I.D. 670,679 (1944).

The sand upon the Alder Gulch claim is decomposed granite of very fine texture. There are at least 240 acres of this sand in the area of the claim according to appellant Brewer, and according to a witness of the Forest Service the deposit is approximately 3/4 of a mile wide and 2 and 1/4 miles long. There are other similar deposits in the Lake Tahoe area but none is considered suitable for appellants' purposes either because the sand is contained in privately-owned lands or is otherwise inaccessible because of its situation within State parks or highway rights-of-way.

Since the claim's location in 1947, appellants have leased two pits to contractors for yearly rentals of $125 for each pit. The contractors have removed approximately 6,000 yards of the sand and have used it or sold it to others for use in making sidewalks, fireplaces, ornamental walls and some foundations for summer homes in the Tahoe recreation area, but primarily as fill for roads and driveways for the summer homes. Because of its fine texture, the sand is well suited for this latter purpose, but cannot be used in concrete for structural purposes and does not meet the specifications of the California Division of Highways for construction work.

At the outset, it should be understood that the use of the sand in the Alder Gulch claim for fill purposes will not validate the claim. Although it has been decided that lands as indicated containing deposits of sand, gravel and other similar minerals which can be extracted, removed and marketed at a profit are mineral lands subject to location and entry under the placer mining laws, Layman et al. v. Ellis, 52 L.D. 714 (1929), this principle has not been extended to include lands which contain deposits of minerals suitable only for fill purposes. The question whether deposits of stone, sand, and gravel are subject to location and patent under the mining laws in cases where by reason of their low quality

---

1/ Section 3 of the act of July 23, 1955 (30 U.S.C., 1952 ed., Supp IV, sec. 611), provides that deposits of common varieties of sand and gravel shall not be deemed to be valuable mineral deposits within the meaning of the mining laws so as to give effective validity to any mining claim thereafter located under such laws.

their use is limited to fill purposes was directed by this Bureau to the Solicitor of the Department in 1955. The Associate Solicitor in his opinion, M-36295 (August 1, 1955), replied in the negative relying upon the ruling in the case of Holman et al. v. State of Utah, 41 L.D. 314 (1912), to the effect that the mere existence of low grade mineral deposits on public lands, even though some limited economic use thereof might be made for fill or other similar purposes, is alone insufficient to justify the acquisition of title thereto under the mining laws. Although the ruling in the Holman case concerned deposits of low-grade clay and limestone, the Associate Solicitor found it to be equally applicable to deposits of low grade stone, sand, and gravel. Considering the position taken in the Holman case the Associate Solicitor concluded in his opinion of August 1, 1955:

> ". . . This position appears to be sound for the very reason that unlimited areas of the public lands contain materials of one sort or another which might be used merely for moving from one place to another for levelling or filling purposes. However, this fact alone cannot be said to justify a ruling that such lands are 'mineral in character' or 'contain valuable mineral deposits' such as will support an entry and patent under the mining laws. To so rule would open the gates to patenting of all lands which contain any type of material which has a possible use for such purposes. For this reason, it is my opinion that the principle announced in Layman v. Ellis, supra, should not be extended to include those cases where the only use to which the deposits of sand or gravel could be made is limited to a movement from one location to another for 'fill' purposes. The ruling in the Holman case appears to fully support this position."

Since the use of the sand from the Alder Gulch claim for fill purposes will not validate the claim the question remains whether to the extent that the sand from the Alder Gulch claim is useful for other purposes, i. e., sidewalks, fireplaces, ornamental walls and some housing foundations, the appellants have made a valid discovery. This depends upon the marketability of the deposit for these purposes, and this factor, in turn, depends upon the existence of a present demand for the sand and the proximity to market. United States v. Black, 64 I.D. 93,95 (1957).

That there exists a present demand for the sand from the claim for other than fill purposes has not been shown by appellants. They have not shown how extensively the sand has been used for other purposes and we can only conclude that such use is negligible in comparison with its primary use for fill. The only direct evidence on this issue is Mr. Anderson's statement that he built 50 fireplaces using decomposed granite which he purchased from one of the lessees but he was unable to say that all of the material came from the pits on the claim. What is said here is not intended to contradict or to deny the testimony of the appellants or their witnesses as to the present or past use of the sand for light construction work. The testimony is only of a general nature, however, and there is simply not enough evidence of such use for us to conclude that there is any real demand for the sand or that an actual market of any consequence exists for it.

We conclude that appellants have not discovered a deposit of a valuable mineral within the meaning of the mining laws, and that the land is nonmineral in character; consequently the Alder Gulch claim is null and void. The application for patent was properly rejected. No consideration has been given to the charge that the land within the claim is more valuable for national forest purposes than for mining, for the reason that such a charge is insufficient to constitute a cause for denying mineral patent or invalidating a mining claim.

Quenton L. Brewer and Bertel A. Anderson are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, then the adverse party to be served is:

Office of the General Counsel
Department of Agriculture
216 Federal Office Building, Civic Center
San Francisco 2, California

Earl D Thomas
Acting Director

Enclosure

Distribution:

Mr. John P. Horgan, Attorney for Appellants (Certified Mail)
Office of the General Counsel, Dept. of Agriculture, San Francisco, California (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer
Mr. John Sieker, U. S. Forest Service, Department of Agriculture (8)
Appeals List No. 1
CCS

42059

In reply refer to:

Contest No. 6781
(Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 20, 1958

Certified Mail
Return Receipt Requested

DECISION

James M. Bishop, Contestant v. State of California, Contestee	:	Contest 6781 involving NW$\frac{1}{4}$ sec. 18, T. 11 N., R. 12 W., San Bernardino Meridian, California

Decision Affirmed

Contest proceedings were initiated by Mr. James M. Bishop protesting the selection by the State of California (Application 0103450 under the General Indemnity Act (43 U.S.C., 815 and 851)), of the NW$\frac{1}{4}$ of section 18, T. 11 N., R. 12 W., S.B.M., California. The contestant alleged that the subject land is mineral in character and that he is an owner of the Queen Anna placer mining claim located on this land. On February 6, 1957, a hearing was held before a hearing examiner at Los Angeles, California, at which time the contestant and contestee, both of whom were represented by counsel, were permitted to introduce evidence and to cross examine witnesses.

The record shows that the Queen Anna Placer claim was located as an association placer embracing approximately 160 acres on July 13, 1955, and recorded on the official records of Kern County on July 19, 1955.

By decision dated June 13, 1957, the hearing examiner dismissed the protest of the contestant. He found from the evidence presented at the hearing that the mineral substance alleged to have been located on the land was a decomposed granitic material referred to generally as sand and gravel. He also found that the first expenditures or discovery work made on the land by the locators was in the form of a bulldozed discovery cut made on September 24, 1955. The examiner found that the subject material was typical of the floor of the Mojave Desert and that due to the vast quantities of the materialaavailable in the immediate area there could only be an occasional demand for it for the purposes of road construction.

It was also found, that while this material could be used as an ingredient in the manufacture of concrete block, no evidence was introduced to show that it would be profitably mined, removed and processed for this purpose. On this basis it was found that the land in issue was nonmineral, and the contestant's protest against the State of California's selection was dismissed.

The contestant filed with the hearing examiner a timely notice of appeal and thereafter a statement of reasons for appeal.

The two principal grounds for appeal as stated by the contestant are as follows: (1) The conclusions of the hearing examiner are not supported by the evidence; and (2) The Bureau of Land Management does not have the jurisdiction to make a finding that will dispossess the owner of a valid mining claim in the State of California.

The State of California filed an answering brief, responding in detail to the first argument raised by the contestants.

The uncontroverted record shows the discovery work relied upon by the contestant was performed on the claim on September 24, 1955. Such discovery, even if otherwise valid, was too late to validate the location as after the act of July 23, 1955 (30 U.S.C., sec. 611), a common sand and gravel deposit having no property giving it a distinct and special value could not be located under the United States mining laws. In effect that act was a withdrawal of public lands from any location based on a discovery of such sand and gravel. It is well settled that a "paper location," that is, one not validated by a discovery, will not stand as against a governmental withdrawal of the land. See Cameron v. United States, 252 U.S. 450, 456; Union Oil Company v. Smith, 249 U.S.337, 346; United States v. Wilmot D. Everett et al., A-27010, Supp., October 17, 1955. None of the testimony indicated that the sand and gravel has any property giving it distinct and special value which would make it subject to location after July 23, 1955. For lack of a valid discovery on the claim prior to the date of the act of July 23, 1955, supra, the location is invalid.

The contention that the United States does not have jurisdiction to inquire into the validity of the claim is untenable. The power of this Department to supervise and control the sale and disposition of the public domain, including mineral lands, has long been recognized. Knight v. United States Land Association, 142 U.S. 161 (1891). Its jurisdiction to inquire into the extent and validity of rights to public land claimed against the Government does not cease until the legal title to the land has passed. Michigan Land and Lumber Co. v. Rust, 168 U.S. 589, 593 (1897). There must be a determination by this Department, the tribunal in which jurisdiction is vested under the public land laws, that the requisites forthe mining laws have been fulfilled. Cf. Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U.S. 301, 312 (1903).

The decision of the examiner is affirmed.

Mr. James M. Bishop is allowed the right of appeal to the Secretary of the Interior in Accordance with the regulations in 43 CFR Part 221, as amended. See enclosed From 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by James M. Bishop, then the adverse party to be served is :

State of California
Deputy Attorney General
600 State Bldg.
Los Angeles 12, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Richard E. Erwin (Certified Mail)
Howard S. Goldin, Deputy Attorney General (Certified Mail)
Hearing Administrative Officer
John Sieker, Dept. of Agri. F.S. (8)
Mr. Charles L. Gilmore, Attorney (Regular Mail)
Mineral Staff Officer (5)
GRH

43552

appeal to Sec
affirmed A-27934 7/20/59

In reply refer to:

Sacramento ML-48
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 24, 1958

Certified Mail
Return Receipt Requested

DECISION

David H. Kenison, et al. : Mining Claim
Pacific Gas & Electric Co. :
:

Decision Affirmed

David H. Kenison et al., recorded a notice of location of their Surprise Placer Mining Claim in the Land Office on January 9, 1956, pursuant to provisions of the Act of August 11, 1955 (30 U.S.C., secs. 621-625). Due to protests of the Forest Service, U.S. Department of Agriculture, and of the Pacific Gas & Electric Company concerning the location, a hearing was conducted in order to determine whether mining operations would substantially interfere with other uses of the land. In a decision rendered July 18, 1957, the hearing examiner dismissed the protests, holding that the placer mining operations would not substantially interfere with other uses of the land. The examiner held, if mining operations are carried on and the land should be left in a barren, destitute nature, it would be detrimental to the scenic beauty of the area, and in accordance with the provisions of Section 2(b) of the Act of August 11, 1955, an Order will be issued granting permission to engage in placer mining operations upon the condition that the locators, their heirs and assigns, following placer operations shall restore the surface of the claim to the condition in which it was immediately prior to those operations.

The Pacific Gas & Electric Company has appealed from the dismissal of its protest, asserting that mining operations would materially interfere with operation of its power plant some 4½ miles downstream because of silting of the stream and by debris from the mining operation. It argues, in substance, that the mining operations would interfere with its prior appropriation and easement rights to the water and that reasonable restrictions should be placed on the mining operation to insure non-interference with its generating plant.

After careful review of the record, including the data presented on appeal, we find no error in the Examiner's decision holding that placer mining operations would not substantially interfere with other uses of the land included within the placer claim. We concur with him in granting permission to engage in placer mining upon condition that the locator shall, following placer operations, restore the surface of the claim to the condition in which it was immediately prior to those operations.

Accordingly, the decision appealed from is affirmed.

Pacific Gas and Electric is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance in the regulations.

In the event of appeal the adverse party to be served is:

Mr. David Kennison, et al.
44100 20th Street, East
Lancaster, California

Earl D Thomas
Acting Director

Enclosure

DISTRIBUTION:

Pacific Gas & Electric Company (Certified Mail)
David H. Kennison et al. (Regular Mail)
Att: A. Brummel, Esq.
Mr. Rawleigh L. Tremain, Acting Chief, Forestry and Lands Div.
U.S. Dept. of Agric., USFS
Minerals Staff Officer (5)
Mr. John Sieker, FSUS
Hearing Administrative Officer
Appeals List No. 1
BF

43552

appeal to Sec
affirmed A-27936 7-1-59

In reply refer to:
Contest 5255
Sacramento 049487
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 29, 1958

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant :
:
v. : Mining Claims
:
Eric North, Contestee :

Decision Affirmed

Eric North has appealed from a decision of the Hearing Examiner, dated August 2, 1957, rejecting his patent application for the Sunshine Consolidated Placer Mining Claim and declaring the individual claims comprising it, the Bigelow, Wizzard and New Hope, totaling 360 acres, null and void for want of a valuable discovery. The contest was initiated by the U. S. Forest Service.

Each claim was located over 40 years ago. Mr. North acquired the claims by purchase in 1948; no commercial exploitation of the lands has been undertaken by him.

The appellant contends the decision appealed from is contrary to the weight of evidence. He has attacked the probative value of the evidence presented by the contestant and alleges that the Examiner failed to give due consideration concerning the showing that the lands involved had sustained extended gold mining activities in past years. He also alleges error in the decision appealed from averring that due consideration was not given to the gold values recoverable in the black sands. He assigns error in law to the declaration that the claims are null and void and argues that even if the (alleged) discovery is insufficient to support a patent application, it is sufficient to support a valid location.

The decision appealed from accurately presented the testimony of the several witnesses. For the purposes of this decision further amplification of the testimony is not necessary except concerning the gold values recoverable in the black sands. In this regard testimony for the contestant was introduced to the effect that the quantum recoverable and the values were so small that it was not worthwhile making recovery thereof in any gold mining operation (Tr. pp. 90-92). The most favorable interpretation of the testimony of the contestee's witnesses may be summed up in the testimony of Mr. Charles Scott Haley (Tr. pp. 289), who testified that the amount of black sands from the three claims might approximate 2 pounds per ton of gravel.

Even if there was a previous valid discovery of the mineral (gold) on each of the claims, and even if the commercial recovery of gold was an economic success, that original discovery and operation (terminating in 1934) will not serve to validate the claims at present if that discovery has been lost for any reason whatsoever. Waskey v. Hammer, 223 U.S. 85 (1912); Gwillam v. Donnellan, 115 U.S. 45 (1885). In order to sustain a location it is not sufficient to show the claims may have been formerly valuable for minerals, but it must be shown as a present fact that the land is mineral in character and is valuable for its mineral content and a valuable discovery has been made within the limits of the claims. United States v. Margherita Logomarcini, 60 I.D. 371 (1949); United States v. Estate of Richard R. Lakin, A-27572 (June 12, 1958). It follows, absent a present valuable discovery on mineral lands, the claims are null and void. United States v. Alonzo A. Adams et al., A-27364 (July 1, 1957).

The finding of colors or traces of gold may in itself warrant further prospecting. But the mere finding of gold traces in gravels and areas where such traces are numerous and in areas once valuable for the gold content thereof does not of itself constitute a valuable discovery warranting a mineral classification of lands. Steele v. Tanana Mines R. Co., 148 Fed. 678. On the other hand it is well established that it is not until minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine, that the requirements of the law have been met. Castle v. Womble, 19 L.D. 455 (1894). The same standard has been applied by the courts. Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920).

The evidence produced at the hearing has been carefully reviewed. It is evident from the record that traces of gold have been found within the limits of the claims and some gold is recoverable. However, we are of the opinion that the quantum of recovery is so low that a person of ordinary prudence would not be justified in further expenditures of labor or means in an endeavor to develop a paying mine. Under such circumstances a discovery of valuable mineral deposits on any of the claims as will support the issuance of a patent has not been demonstrated. United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955).

Appellant has contended on appeal that the discoveries alleged are sufficient to support the locations albeit they may be insufficient to support a patent application. In support of this view sec. 336 from 2 Lindley on Mines, Third Edition (p. 768) was quoted in part. The cited authority must be taken in context. When this is done it is clear that a location, valid on its face, but insufficient in discovery to support a patent application, will suffice, insofar as rival claimants to the land are concerned, to allow continued possession of the land in the locator. But determination concerning the right of possession as between rival claimants is not a determination concerning the mineral value of the land or whether it has been validly located. Cf. The Clipper Mining Co. v. The Eli Mining and Land Co. et al., 33 L.D. 660 (1905), cited by Lindley.

Here we are not concerned over the right of possession between rival claimants to the same land. We are concerned with a more basic matter, whether the land is mineral in character and whether a valid discovery to support a valid mining location has been made. This goes to the very essence concerning the location of the land and the validity of the claims. Since the decision appealed from was rendered only after due consideration of all the facts and evidence presented and no error is found therein, we concur and find that it is not demonstrated that a valid discovery of a valuable mineral has been made and that the claims are null and void. Cf. United States v. Alonzo A. Adams et al., supra.

Accordingly the decision appealed from is affirmed.

Mr. North is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations. In the event of appeal, then the adverse party to be served is: Office of the General Counsel, United States Department of Agriculture, 212 Federal Office Bldg., Civic Center, San Francisco 2, California.

Earl J Thomas

Acting Director

Enclosure

DISTRIBUTION:
Gilmore & Gilmore, Attorneys at Law (Certified Mail)
Mr. Eric North (Regular Mail)
Hon. Thomas H. Kuchel, United States Senate
Mr. George H. Soule, Jr., House of Representatives
Mr. John Sieker, Forest Service, U. S. Dept. of Agriculture (8)
Office of the General Counsel (Regular Mail)
Hearings Administrative Officer
Minerals Staff Officer (5)
Appeals List No. 1
BF

45092

In reply refer to:
Los Angeles 085022
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 10, 1958

Certified Mail
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DECISION

Richard Lee Triplett : Sodium Lease Application

Decision Affirmed

Mr. Triplett has appealed from a rejection of his preference right sodium lease application. The application was rejected for the reason that a valuable discovery of sodium had not been made during the term of the previously issued prospecting permit. The decision recited that although sodium was encountered during exploration the concentration of sodium of one per cent or less found in analysis of one of the core test holes, was so small that it could not be considered a valuable discovery.

The appellant does not question the findings concerning the percentage concentrate of the sodium encountered in the core holes. He contends the concentrate encountered is a valuable discovery under the applicable law and regulations and that a lease should be issued to him. He has failed to submit any evidence other than his own uncorroborated statements concerning the commercial value of the sodium deposits.

The Geological Survey has reported that sodium in the percentages found during exploration is not such as to constitute a valuable sodium mineral discovery.

The record has been carefully reviewed. We find the determination made by the Manager that a valuable discovery of sodium was not made upon the permit lands is fully supported by the evidence of record. Since no discovery was made, it was proper for the Manager to reject the lease application. Accordingly, the decision appealed from is affirmed.

Mr. Triplett is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Richard Lee Triplett (Certified Mail)
Chief, Branch of Mining, Conservation Div., Geological Survey (10)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
BF

45092

MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under Public Law 167 is the maximum time allowable for such purpose, and it may not be extended by the Department.

Clare Warren, Sacramento P. L. 167-13-5 (December 4, 1958)

In reply refer to:
Sacramento P.L. 167-13-5
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 4, 1958

Certified Mail
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DECISION

Clare Warren	:	Mining Claim

Decision Affirmed

Clare Warren has appealed from a decision of March 26, 1958, rejecting the verified statement filed under section 5 of the Act of July 23, 1955 (30 U.S.C. sec. 613(a); P. L. 167) with respect to the Cedar Grove Placer mining claim. The statement was rejected for the reason that it was not timely filed, that is, within 150 days from March 28, 1957, the date of first publication of notice that the filing of such a statement was required.

The appellant contends, in effect, that since she was not apprised concerning the newspaper publication and was not served with notice of the proceedings, the verified statement should be accepted although it was not filed within 150 days after the first publication.

The Act of July 23, 1955, limits the uses which may be made of the surfaces of claims located after the date of the passage of the Act. In addition, the Act provides a procedure whereby persons who have made mining locations before the date of the Act must, when called upon to do so by a published notice, assert their rights to the use of the surface. Persons not timely asserting their rights to the use of the surface also become subject to the limitations of the Act. This assertion of rights takes the form of a verified statement, made in the manner specified in Section 5 of the statute, and in sections 185.123 to 185.137 of the regulations (Title 43, Code of Federal Regulations). Section 5 of the Act states that:

> "If any claimant under any unpatented mining claim heretofore located which embraces any of the lands described in any notice published in accordance with the provisions of subsection (a) of this section, shall fail to file a verified statement * * * within one hundred and fifty days from the date of the first publication of such notice, such failure shall be conclusively deemed,

except as otherwise provided in subsection (e) of this section,

(i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and

(ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and

(iii) to preclude thereafter, prior to issuance of patent any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims."

A notice was published pursuant to the provisions of this Act on March 28, 1957. The appellant submitted her verified statement to the Land Office on February 19, 1958, more than 150 days after the first publication of the notice. The express language of the statute is that the failure to file the verified statement within 150 days after the first publication is conclusively deemed a relinquishment of certain rights to use the surface. It is beyond the authority of this Department to deviate from the clearly expressed will of Congress. Since the verified statement was not filed within the 150-day period, the appellant must be deemed to have relinquished the right to use the surface of the mining claims in a manner inconsistent with the Act of July 23, 1955. The decision appealed from is therefore affirmed.

The appellant is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley

Director

Enclosure

DISTRIBUTION:
Clare Warren (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Mr. John Sieker, Forest Service, U. S. Department of Agriculture (8)
Appeals List No. 1
BF

46567

MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under Public Law 167 is the maximum time allowable for such purpose, and it may not be extended by the Department.

Cecil T. Vivian et al., Sacramento 77956 (P.L. 11-38) (December 4, 1958)

In reply refer to:
Sacramento 77956
P.L. 11-38
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 4, 1958

Certified Mail
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DECISION

Cecil T. Vivian, Virginia A. Vivian, and Forest Mines, Inc. : Mining Claims

Decision Affirmed

The parties above named have appealed from a decision of November 5, 1957, rejecting their verified statement filed August 13, 1957, under section 5 of the Act of July 23, 1955 (30 U.S.C. sec. 613(a); P. L. 167). The statement was rejected for the reason that it was not timely filed, that is, within 150 days from March 14, 1957, the date of first publication of notice that the filing of such a statement was required. The statement was filed one day late.

The appellants contend, in effect, that the verified statement should be accepted although it was not filed within 150 days after the first publication. The appellants contend they had been in communication with the Forest Service concerning the requirements of the law because the lands involved are in a national forest, and they did not understand the rigid interpretation of the law concerning timeliness of filing with the Land Office.

The Act of July 23, 1955, limits the uses which may be made of the surfaces of claims located after the date of the passage of the Act. In addition, the Act provides a procedure whereby persons who have made mining locations before the date of the Act must, when called upon to do so by a published notice, assert their rights to the use of the surface. Persons not timely asserting their rights to the use of the surface also become subject to the limitations of the Act. This assertion of rights takes the form of a verified statement, made in the manner specified in Section 5 of the statute, and in sections 185.123 to 185.137 of the regulations (Title 43, Code of Federal Regulations). Section 5 of the Act states that:

> "If any claimant under any unpatented mining claim heretofore located which embraces any of the lands described in any notice published in accordance with the

> provisions of subsection (a) of this section, shall fail to file a verified statement * * * within one hundred and fifty days from the date of the first publication of such notice, such failure shall be conclusively deemed, except as otherwise provided in subsection (e) of this section,
>
> (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and
>
> (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and
>
> (iii) to preclude thereafter, prior to issuance of patent any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims."

A notice was published pursuant to the provisions of this Act on March 14, 1957. The appellants submitted their verified statement to the Land Office on August 13, 1957, more than 150 days after the first publication of the notice. The express language of the statute is that the failure to file the verified statement within 150 days after the first publication is conclusively deemed a relinquishment of certain rights to use the surface. It is beyond the authority of this Department to deviate from the clearly expressed will of Congress. Since the verified statement was not filed within the 150-day period, the appellants must be deemed to have relinquished the right to use the surface of the mining claims in a manner inconsistent with the Act of July 23, 1955. The decision appealed from is therefore affirmed.

Counsel for the appellants submits that the verified statement was executed and mailed on the 10th of August and should have been received in the Land Office on or before the 12th. Perusal of the statement shows that although it was executed on August 10, the notary's signature was not affixed until August 12th. It, therefore, does not appear that the document was mailed prior to the 150th day after the first publication.

The appellants herein are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

Distribution on page 3

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Geological Survey (3)
Regional Forester, Nevada City, California
Mr. John Sieker, Forest Service, U. S. Department of Agriculture (8)
Appeals List No. 1
BF

46567

__LEASABLE MINERALS__ * 5 __Sodium__
(Other than Oil and Gas)

An applicant for a prospecting permit under the Mineral Leasing Act acquires no vested right to a permit but only an inchoate right to receive a permit over a later filed applicant if a permit is issued.

Where an application for a sodium prospecting permit describing certain unsurveyed lands is filed, and subsequently, prior to the issuance of a permit, a survey is completed disclosing that some of the lands are in section 16, a school section, the permit application as to the lands in the school section is properly rejected because immediately upon completion of the survey title to the lands and minerals in section 16 vested in the State under the provisions of the Act of July 11, 1956 (Public Law 699, 84 Congress), and the United States no longer has any interest on which a permit may issue.

__George Wilson Rolens__, Los Angeles 0137326 (December 4, 1958)

LO

Mr. Rolens is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of appeal by Mr. Rolens, then the adverse party to be served is:

State of California
Division of State Lands
1403 Twelfth Street
Sacramento 14, California

Edward Woozley
Director

Enclosure

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Mr. George Wilson Rolens (Certified Mail)
State of California (Regular Mail)
Minerals Staff Officer (5)
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Lands Staff Officer
Appeals List No. 1
BF

567

appeal to Sec
affirmed A-27970 12-19-59
LL(Sec)

MINING CLAIMS * 3 Contests

A placer mining location for deposits of a common variety of sand and gravel is invalid where it is not perfected by a valid discovery of deposits having a present actual market value prior to the enactment of the Act of July 23, 1955.

United States v. The Dredge Corporation, Inc., Contests Nos. Las Vegas 121 etc.

(December 15, 1958)

In reply refer to:

Contests Nos. Las Vegas 121,
etc.
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 15, 1958

Certified Mail
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DECISION

United States of America, Contestant :
v. : Mining Claims
Dredge Corporation, Inc., Contestee :
Southern Nevada Homesiters, Inc., Intervenor :

Decision Modified and Affirmed

The complaints in the contest proceedings listed in the appendix hereof charged that the lands embraced in the mining claims are nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery. Other charges were asserted against the claims particularizing these charges. The contests were consolidated in a hearing duly held. The hearing examiner, by decision of July 15, 1957, found the claims in groups 1, 2 and 4 to be null and void for want of discovery, and the Dredge Corporation, Inc., appealed from that ruling. The examiner found the placer claims in group 3 1/ to be valid and supported by a valid discovery on each claim, and the Government appealed from that ruling.

It is established that all the claims involved in these appeals were located solely for the common variety of sand and gravel contained therein. The materials removable from the claims are usable for certain construction purposes.

1/ The southwest portion of the Dredge No. 54 was not contested. That 40-acre area is described as the SW¼SE¼ sec. 10, T. 21 S., R. 60 E., M.D.M. The entire claim occupies the SW¼ sec. 10.

In order to establish a valid discovery upon the lands involved, within the purview of the mining laws, it must be shown that the materials can be extracted, removed, and marketed at a profit. See United States v. Everett Foster et al., 65 I.D. 1 (1958); United States v. Strauss et al., 59 I.D. 129 (1945) and cases cited therein. Discovery and marketability of the deposits must be demonstrated prior to the withdrawal of the land from location for the common varieties of sand and gravel effected by the Act of July 23, 1955 (Public Law 167; 30 U.S.C. sec. 601). However, if marketability of the materials sought to be mined were established since that date, but based on a discovery of materials prior to that date, the value established would be considered as relating back prior to July 23, 1955 or prior to small tract classification of the land. 2/ Cf. United States v. Estate of Victor E. Hanny, A-27362 (September 24, 1957).

The Dredge Corporation contends that all the lands in its mining claims contain valuable minerals, of which discovery was made, and which at all times since locations thereof have been marketable at a profit. It argues that the prospective marketability is even greater now than at times of location because of certain changed market conditions, expected and anticipated construction, and demand for road building materials under the Federal Highway Act of 1956. The Government, on the other hand, contends that the quality and quantity of the deposits involved are insufficient to constitute valid discovery and that their alleged marketability is conjectural rather than actual or prospective.

The examiner accurately summarized all pertinent testimony in his decision. All the claims, subject of this appeal, lie westerly of the city of Las Vegas and are accessible to highways leading to the city. The entire area covered by the claims, and each separate claim, is underlain by a cemented conglomerate referred to locally as caliche. Gravels lying above the caliche are mined in the area, however, the caliche is left undisturbed since blasting would be necessary to remove it. At no place has the caliche been removed in the claims here involved for the purpose of ascertaining the extent of the gravels, if any, below it. The gravels above the caliche are coated with a calcareous material, and although testimony was adduced to show that they might be used for concrete construction, it was established that the sole use of these gravels are for fill, parking lot and road construction, and for use in manufacture of asphaltic concrete.

At unspecified times prior to the hearing the contestee dug "discovery" pits on each 10-acre subdivision of the several claims. These pits are very shallow reaching only to the caliche and range in depth from several inches to 18 inches; several pits are 2 to 4 feet in depth.

2/ For further discussion concerning the effect of small tract classifications in conflict with mining claims, see The Dredge Corporation, 64 I.D. 368 (1957).

The gravels uncovered are of poor quality and must be washed of the silt and other foreign materials. Better gravel deposits are spotty in the washes in the area. Several "stockpiles" of surface deposits were bulldozed The bulldozed areas do not exceed the width of the blade, 12 feet, and do not exceed 18 inches in depth. It does not appear that the "stockpiling" of such minor amounts of surface scratchings are of any value for actual commercial purposes.

The claims in group 3 are leased to the Wells Cargo Company. That company operates a commercial gravel pit on the Dredge Nos. 61 and 62 claims. The No. 61 and No. 62 claims are not contested. The operations have extended northward into the southwest portion of the Dredge No. 54 claim. It is shown that the depth of deposits in the area of operations on the No. 54 claim is substantially similar to that on the Nos. 61 and 62 claims. That operation constitutes the only commercial enterprise affecting any of the claims involved in these contests. Although of far superior quality to the gravels on the claims in Groups 1 and 2, the gravel contained in that pit is also coated with a calcareous substance and is used only for road, parking lot and fill purposes.

Concerning road construction in the Las Vegas area, it is shown that the county and state operate their own pits and do not make direct purchases of gravel for road construction; purchases of relatively small quantities of gravel for road construction are sometimes made through subcontractors. Anticipated sales of materials for roads, even under the Highway Act (which was not enacted until after July 23, 1955), however, are conjectural rather than actual or prospective.

The testimony further establishes that the several sand and gravel suppliers of the area, including the Wells Cargo Company, are operating on a curtailed schedule because of lack of demand for their products. We conclude that since the present market is amply supplied and the supplying of road building demands is more conjectural than prospective that a prudent man would not have been on July 23, 1955, nor would one be today, justified in expending time or means with the reasonable prospect of success in developing a paying mine for sand and gravel for such uses.

Review of the record substantiates the examiner's findings concerning the claims in Groups 1, 2, and 4. Those lands contain, at most, spotty surface accumulations of sand and gravel. Such spotty deposits of inferior quality, requiring processing prior to use that would multiply the mining costs several times in excess of the market price are not such as would warrant a prudent man in expending labor or means in an effort to develop a paying mine thereon. Insofar as the claims in Groups 1, 2, and 4 are concerned it is not shown that the contestees discovered deposits of valuable minerals, within the contemplation of the mining laws. Accordingly, the decision holding those claims null and void is affirmed.

As to the claims in Group 3, it was noted above that the Wells Cargo Company is operating on the Dredge No. 61 and 62 under a lease and has extended its operation northward to include the southwest portion, 40 acres of the No. 54 claim. That portion of the No. 54 claim is not involved in this appeal. The deposits on the other lands in the No. 54 claim, and the deposits in the Nos. 52, 53, 55, 56 and 57 claims are of diminishing quality and quantity as distance to the workings on the Nos. 61 and 62 increases. Test "discovery" holes and cuts on all these lands show a poorer grade and more shallow deposits as distance to the main pit increases. Although small quantities of gravel have been removed from these lands, the deposits remaining therein are but of shallow depth and underlain by a conglomerate; such deposits as remain on these claims are of such poor quality that economical (commercial) operations thereof are impractical because the cost of recovery and processing would be prohibitive. In such case the marketability of the remaining deposits is not shown, and notwithstanding proximity to the Wells Cargo pit, we believe that a prudent man would not be warranted in expending his labor and means with the reasonable expectation of success, in developing a mine on any of the lands within these claims involved in this proceeding. It follows that these claims, excluding the southwest portion of the No. 54 claim which is not involved in this appeal, are null and void for want of a valid discovery.

Accordingly, the examiner's decision is modified to this extent and affirmed as modified.

The parties adversely affected by this decision are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal by the Dredge Corporation, Inc., the adverse parties to be served are:

Field Solicitor
Department of Interior
1495 Wells Avenue
Reno, Nevada

Morton Galane, Attorney
Southern Nevada Homesiters, Inc.
Cornet Building
Las Vegas, Nevada

In the event of an appeal by the Southern Nevada Homesiters, Inc., the adverse parties to be served are:

The Dredge Corporation, Inc.
c/o Bonner & Rittenhouse
Attorneys at Law
109 South 3rd Street
Las Vegas, Nevada

Field Solicitor
Department of Interior
1495 Wells Avenue
Reno, Nevada

Edward Woozley
Director

Enclosure

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Bonner & Rittenhouse, Attorneys (Certified Mail)
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Hon. George W. Malone, U.S.S.
Hon Walter S. Baring, H.R.
Geological Survey (3)
Chief, Branch of Mining, Conservation Division, U.S. Geological Survey (10)
Minerals Staff Officer (5)
Lands Staff Officer
Hearings Administrative Officer
Appeals List No. 1
BF

APPENDIX

Group 1

Alpha, Beta, Delta, Epsilon, Gamma and Dredge Nos. 1, 2, 3 and 4 placer mining claims.	Contest Nos. 139, 140, 141, 142, 143, 159, 160, 161 and 162, respectively.

Group 2

Dredge Nos. 13, 14, 15, 16, 36, 37, 40, 41, 44 and 45 placer mining claims	Contest Nos. 144, 145, 146, 147, 149, 151, 152, 153, 148 and 150, respectively.

Group 3

Dredge Nos. 52, 53, 54, 55, 56, and 57 placer mining claims.	Contest Nos. 123, 124, 208, 125, 121 and 122, respectively.

Group 4

Dredge Nos. 63, 64 and 66 placer mining claims.	Contest Nos. 127, 128 and 129, respectively.

appeal to Sec
affirmed A-27967 LC(Sec)

MINING CLAIMS * 3 Contests

A placer mining claim located for a common variety of sand and gravel is invalid where it is not perfected by a valid discovery of deposits having a present actual market value prior to the enactment of the act of July 23, 1955

United States v. Clear Gravel Enterprises, Inc., Contests Nos. 189 and 190 (Las Vegas)

(December 16, 1958)

LO

Contest Nos. 189 and 190
(Las Vegas) 5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 16, 1958

Certified Mail
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DECISION

United States :
v. :
Clear Gravel Enterprises, Inc. : Mining Claims
:
Southern Nevada Homesiters, Inc., :
Intervenor :

Decision Affirmed

The complaints in contest proceedings, Nos. 189 and 190, against the Clear Gravel Nos. 10 and 11 placer mining claims, charged that the lands embraced in the mining claims are nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantity and quality to constitute a valid discovery. Other charges in the complaints particularized these two charges in challenging the validity of the claims. The hearing examiner, by decision of November 27, 1957, after summarizing the evidence assembled at the hearing, and stating that in order to establish a valid discovery upon the lands involved it must be shown that the materials (sand and gravel of a common variety) for which the claims were located have a present and/or prospective market value, found that the materials on the contested claims are not marketable and declared the claims null and void. Clear Gravel Enterprises, Inc., has appealed from that decision.

In order to establish a valid discovery upon lands located for a common variety of sand and gravel, it must be shown that the materials have a present and/or prospective market value. United States v. Everett Foster et al., 65 I.D. 1 (1958); United States v. Strauss et al., 59 I.D. 129 (1945) and cases cited therein. Discovery and marketability of the deposits must be demonstrated prior to the withdrawal of the land from location for the common varieties of sand and gravel effected by the act of July 23, 1955 (Public Law 167; 30 U.S.C., sec. 601).* However, if marketability of the materials sought to be mined were established since that date but based on a discovery of materials prior to that date, we would find the prospective value established relating back prior to July 23, 1955. Cf. *United States* v. *Estate of Victor E. Hanny*, A-27362 (September 24, 1957).

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* For discussion concerning the effect of small tract classifications in conflict with mining claims, see The Dredge Corporation, 64 I.D. 368 (1957).

The appellant contends that the lands within the subject mining claims contain valuable minerals of which discovery was made, and which at all times since locations thereof have been marketable at a profit. Although it concedes that actual commercial exploitation of the lands has not been undertaken it argues that the value of the materials is such as would warrant a prudent man in the expenditure of time and means, with the reasonable prospect of success in developing paying mines on the properties. To bolster this argument it shows commercial development of similar lands as mining properties and states that the 320 acres within these claims is held as a reserve for that operation.

Under the charges brought against the claims, the contestee had the burden of showing that it had made a valid discovery within the limits of the claims. Although the Government initiated the charges and had the initial burden of sustaining the charge that there had been no discovery, if it were to prevail in the contests, once the Government had produced evidence to show that no discovery had been made, it was up to the contestee to overcome that evidence.

The Government established a prima facie case to the effect that no discovery had been made within the limits of the Nos. 10 and 11 claims. It showed that the deposits within these claims are of inferior quality than in the nearby operating pit of the appellant. That pit is approximately 2 miles distant. It also showed that no deposits had been removed from the premises and that there was no actual present market for the materials involved. The contestant relied on exhibits previously introduced in contest proceedings against other mining claims 1/ in an effort to establish actual and prospective marketability of the gravel from these claims. Those exhibits have been carefully reviewed together with the other evidence of record. We find that the determination made by the hearing examiner that no discovery, within the purview of the mining laws, had been made within the limits of the claims is fully supported by the record. We find that the anticipated markets suggested by the appellant is conjectural rather than actual or prospective and that a prudent man at no time since location of the claims would be justified in expending time, labor or means with the reasonable prospect of success in developing a paying mine for sand and gravel from the subject claims. In such circumstances the marketability of the deposits is not demonstrated. The claims are, therefore, null and void for want of a valid discovery.

Accordingly, the decision appealed from is affirmed.

1/ *United States* v. *The Dredge Corporation, Inc.*, Contests Las Vegas No. 121 etc.

Clear Gravel Enterprises, Inc., is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of appeal the adverse parties to be served are:

Field Solicitor
Department of the Interior
1495 Wells Avenue
Reno, Nevada

and

Morton Galane, Attorney
Cornet Building
Las Vegas, Nevada

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. John W. Bonner, Attorney at Law (Certified Mail)
Clear Gravel Enterprises, Inc. (Regular Mail)
Mr. Morton Galane, Attorney (Regular Mail)
Field Solicitor, Reno, Nevada (Regular Mail)
Geological Survey (3)
Chief, Branch of Mining, Conservation Div., Geological Survey (10)
Minerals Staff Officer (5)
Lands Staff Officer
Hearings Administrative Officer
Appeals List No. 1
BF

appeal to Sec
dismissed A-28021
6/15-59

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 5 Government Contests
* 1 Generally

The charges in a complaint are taken as confessed when the contestee fails to answer or having answered withdraws his answer.

Where a hearing in a contest was scheduled and the contestee appeared without counsel and volunteered a written withdrawal of his answer, the charges were properly taken as confessed.

After confession of the charges, and decision based thereon, a motion for a hearing or rehearing is properly denied where no substantial reason is offered warranting a hearing on the merits and where no showing is made that the result of a hearing would alter or change the decision appealed from.

United States v. Napoleon D. Cote et al., Contest Nos. 4-4, etc.
(Sacramento)
(January 28, 1959)

DEPT. OF INTERIOR
SACRAMENTO, CAL.
FEB 9 10 00 AM 1959
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

RO

In reply refer to:

Contest Nos. 4-4, 4-5, 4-6,
and 4-7 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 28, 1959

Certified Mail
Return Receipt Requested

DECISION

United States v. Napolean D. Cote et al.	) ( ) ( )	Mining Claims

Decision Affirmed

Contest proceedings were initiated against the mining claims of the contestee-appellant, Napolean D. Cote. Issue was joined by service of an answer to the complaint; the answer was prepared by Bernard A. Sheridan, attorney of record. Mr. Cote appeared at the hearing, duly scheduled, unaccompanied by counsel. No hearing was held; instead Mr. Cote signed a holographic document withdrawing the answer to the complaint. Thereafter, by decision of December 13, 1957, the Hearing Examiner found, the answer having been withdrawn, that the charges in the complaint were confessed; he declared the claims null and void.

An appeal from that decision, prepared by counsel, Mr. Sheridan, is, in effect, a petition to reinstate the answer and to reschedule a hearing. The reasons assigned for that request are basically that Mr. Cote appeared without his attorney, and without his advice, that counsel on the date of hearing was ill and unable to attend, and that Mr. Cote was persuaded by persons believed to be Forest Service personnel or Bureau of Land Management employees to withdraw his answer. Allegation is made that Mr. Sheridan's office had obtained a postponement of the hearing but that appellant was unaware of the postponement and unable to reach his attorney.

If Mr. Sheridan was hospitalized on September 9 or 10, 1957, when the hearing was scheduled, and the Hearing Examiner was so advised, refusal of a postponement would have been highly irregular and the relief requested would be granted. However, the self-serving declarations of the appellant concerning illness of counsel and allegations of undue influence and misrepresentations by unnamed Forest Service or Bureau of Land Management employees without a scintilla of corroborative evidence are without merit. On the other hand it appears clear to us that every courtesy and opportunity was afforded the appellant as a contestant in the proceedings. The appellant could have contacted the office of his attorney if he so desired and could have come to the hearing prepared to hear and offer testimony concerning the mining claims. We find no error in the Examiner accepting - at face value - a volunteered statement furnished without coercion by one in possession of his faculties and able, if he so desired, to secure legal advice. Furthermore, no showing is made that would indicate that the result of a hearing would alter or change the decision appealed from.

Accordingly, the relief requested is denied and the decision appealed from is affirmed.

Mr. Cote is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is filed, the adverse party to be served is:
Regional Solicitor
Office of the Solicitor
Department of the Interior
Post Office Box 4291
Sacramento 21, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Bernard A. Sheridan, Attorney (Certified Mail)
Mr. Napoleon D. Cote (Regular Mail)
Hearings Administrative Officer
Minerals Staff Officer (5)
Regional Solicitor (Sacramento)
Mr. John Sieker, Forest Service, U.S.D.A.
Appeals List No. 1
BF

LEASABLE MINERALS
(Other than Oil and Gas)

* 5 Sodium

* 1 Generally

A sodium prospecting permit application for unsurveyed land which does not describe the land by metes and bounds tied to a corner of the public survey by courses and distance is defective and must be rejected; the applicant should be allowed an opportunity to correct his application by furnishing the necessary metes and bounds description of the lands sought.

Thomas D. Reese, Los Angeles 0142313
(February 10, 1959)

In reply refer to:
Los Angeles 0142313
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 10, 1959

Certified Mail
Return Receipt Requested

DECISION

Thomas D. Reese : Sodium

Rejection Affirmed

Mr. Reese has appealed from a decision of the Manager, rejecting his above-noted sodium prospecting permit application for unsurveyed lands under the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., secs. 261-263), on the basis that the lands were not subject to such application. The Manager stated the lands were withdrawn from all forms of appropriation under the public land laws by Public Land Order No. 28 (7 F.R. 6691, August 25, 1942), and reserved for the use of the Department of the Interior in connection with the prosecution of the war.

The appellant contends that core drilling operations can be conducted on the lands without detriment to the purpose for which the lands were withdrawn.

The record shows that, under Public Land Order No. 28, all lands involved in this application, excepting the W½ Sec. 29, T. 18 N., R. 5 E., S.B.M., California (which is vacant public land not in the withdrawal)[1] were "withdrawn from all forms of appropriation under the public land laws, including the mining laws ***." The lands are unsurveyed.

The Manager's decision is incorrect. Since the order did not except the lands from the mineral leasing laws the lands are considered available for mineral leasing. Unless the Mineral Leasing Act or a withdrawal or reservation specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing under the Act. Noel Teuscher et al., 62 I.D. 210 (1955).

Nevertheless further examination of the application discloses it must be rejected for the reason that a metes and bounds description was not supplied for the lands but they were described only by probable legal subdivisions.

---

[1] and certain tracts in secs. 22, 26 and 27 which are included in patented mining claims, which lands are no longer owned by the United States.

Departmental regulations (43 CFR 195.8,195.17(a)) provide with respect to land descriptions as follows:

> (2) If the requested lands are surveyed, they should be described by legal subdivisions, showing meridian, state, township, range, and section; if not surveyed, by metes and bounds connected by courses and distance with some corner of the public land survey. When possible, the approximate legal subdivisions of unsurveyed lands should be stated.

It is to be noted the regulation states the metes and bounds description "should" be furnished; failure to supply such description is not a fatal defect, therefore, but the application may be corrected.

Consequently, the rejection of the application is affirmed, however, the appellant is allowed 30 days from receipt of this decision within which to correct his application by supplying a metes and bounds description of the lands sought, to permit of accurate identification of the lands.

Mr. Reese is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

Distribution:
Mr. Thomas D. Reese (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
EG

49261

MINING CLAIMS * 7 Location
* 16 Application for Patent

Actual possession under color of right for the complete period of the State's statute of limitations governing adverse possession of mining claims, following a discovery of valuable minerals, is sufficient to establish a valid mining claim, absent adverse locators, good against all but the United States under 30 U.S.C. sec. 38.

Where a mining claim in California was located in 1940 while the land was under an allowable permit application under the Mineral Leasing Act, but was held for more than 5 years after termination of the permit under color of right, HELD: Since actual possession under color of right for the complete period of the State's statute of limitations governing adverse possession for mining claims is shown, the mining claimant is entitled to patent, all else being regular.

Charles J. Roycroft, Los Angeles 0134788
(February 11, 1959)

In reply refer to:

Los Angeles 0134788
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 11, 1959

DECISION

Charles J. Roycroft : Mining Claims
:
:

Case Remanded

Mr. Roycroft has appealed from a decision of October 17, 1957, rejecting the mineral patent application for the Hindsight placer mining claim and declaring that claim and the Vanuray lode mining claim, situated within the Hindsight location, null and void. The land involved is the NE¼ sec. 26, T. 11 N., R. 8 W., S.B.M., California. The mining claims were declared null and void because they were located at times when the lands embraced therein were included in allowable permit applications under the Mineral Leasing Act, as amended.

The appellant stated that waivers or relinquishments of rights to Leasing Act minerals were recorded in accordance with the provisions of section 8 of the act of August 13, 1954 (30 U.S.C. sec. 521 et seq.). He asserts, in view thereof, that even if the claims when located were included in outstanding permit applications, the claims are validated under the act of August 12, 1953 (30 U.S.C. secs. 501-505) or the act of August 13, 1954. He contends that since he, or his predecessors in interest, held the Hindsight claim and worked it for a period in excess of the period of time prescribed by the statute of limitations for mining claims of the State of California, no adverse claim being asserted during that period of time, that he is entitled to a patent therefor.

The Hindsight claim was located on July 27, 1940, at a time when the land was included in an outstanding mineral permit application under the Mineral Leasing Act. The attempted location was, therefore, a nullity and of no effect; absent compliance with the act of August 12, 1953, with respect to the filing of amended notices of location as provided by that act, the location remains invalid. Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957); The Dredge Corporation, 64 I.D. 368 (1957).

The mineral permit application pending on July 27, 1940 was extinguished by relinquishment of the permit issued pursuant thereto on August 26, 1940, 30 days after the attempted location. The locators remained in quiet possession of their claim from the date of the attempted location at least until June 14, 1949, when another allowable permit application under the Mineral Leasing Act was filed. Over eight years is thus shown to have elapsed during which time no adverse claim to the lands involved appears to have been asserted. May mineral patent issue under such circumstances?

30 U.S.C. sec. 38 (R.S. 2332) provides, in pertinent part that:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to patent thereto * * * in the absence of any adverse claim * * *."

Under the cited statute it has been held that the open, notorious and continuous possession and working of a mining claim, with due compliance of law, for a period equal to the time prescribed by the statute of limitations for mining claims, in the State wherein such claim is situated, entitled the claimant to a patent, in the absence of any adverse claim during that period. Paul B. Warnekros, 41 L.D. 653 (1913).

It would appear from the quoted statute and cited authority, that if the claimant (and his predecessors in title) had been in possession holding the claims openly and adversely as to all others and worked the Hindsight placer mine for the period specified in the statute of limitatio for mining claims in California (5 years), subsequent to August 26, 1940 and prior to June 14, 1949, he is entitled to have the same passed to patent, all else being regular. Solicitor's Opinion, M-36388 (November 13, 1956).

Accordingly, the case record is remanded for further processing of the patent application. Attention is invited to the proofs necessary under 43 CFR 185.75 through 185.77. The applicant is directed to comply with the requirements of those regulations within a reasonable period of time from the date of this decision. The Manager should advise the claimant concerning any further requirements and allow him a reasonable time within which to comply with such requirements and the terms of this decision.

Edward Woozley
Director

DISTRIBUTION:

SS(California) w/case record
Mr. Grover Johnson, Attorney at Law (Regular Mail)
Hon. Patrick J. Hillings, House of Representatives
Charles J. Roycroft (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
BF

OIL AND GAS * 9 Lands Subject to Leasing

CLASSIFICATION * 4 Lands Available for Leasing (Sodium)

A sodium prospecting permit application for lands included within a desert land entry not impressed with a sodium reservation is properly rejected where the lands are found to be not prospectively valuable for sodium. The findings of the Geological Survey that the lands are not prospectively valuable, in the absence of evidence to the contrary, is binding upon the Bureau of Land Management.

Lottie H. Knight, et al., Los Angeles 0142090 etc.
(February 24, 1959)

In reply refer to:
Los Angeles 0142090
0142118
0142119
0142122
0142123
0142125
0142148
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

February 24, 1959

Certified Mail
Return Receipt Requested

DECISION

Lottie H. Knight :
Fred Nelson :
Clifford Leckrone : Sodium Prospecting Permit Applications
Betty Lopardo :
F. V. Lopardo :

Decisions Affirmed as Modified
Cases Remanded

The above-named parties appealed from decisions of the Manager dated October 1, 4, 7 and October 10, 1957, respectively, to the extent in which the above captioned sodium prospecting permit applications were rejected for the reason that the lands are embraced in desert land entries and the lands have been classified for such disposal and a field report from the Geological Survey shows that the lands are not prospectively valuable for sodium.

In their appeal, appellants contend that the land in each respective case is prospectively valuable for sodium and in support thereof state that sodium borates and other sodium compounds have been found in regions reasonably near to the involved lands. Mrs. Knight also states that an industrial group having vast experience and knowledge concerning minerals purchased lands in the same general area in which she planned to test by core drilling.

In supplemental reports dated October 23, 1958, and October 24, 1958, U. S. Geological Survey, confirmed that they previously reported that the lands are not prospectively valuable for sodium.

As to Mrs. Knights' appeal in L.A. 142090, Geological Survey further reported that;

"The applicant has supplied no additional information other than her personal opinion and her interpretation of a report from an un-named geologist as to the value for sodium of the land in question. Her reference to land being acquired by a large company in the same and adjoining townships is probably correct since much of the township to the west is occupied by Harper Lake, a possible source of sodium and other salines. However, the land in question is several miles from the lake and wells drilled in the intervening area have shown no indication of any saline or borate deposits at depth.

" *** We still classify the land in the application as not prospectively valuable for sodium."

In regard to the other appeals, Geological Survey stated:

"The applicants based their appeal on the geology shown on plate 1, U. S. Geological Survey Prof. Paper 275 and on information found on pages 91 and 92 thereof. This area is 10 to 15 miles from the lands included in the applications. The origin of the limestone briefly mentioned on pages 91 and 92 of the publication cited is not discussed. Further, there is no mention of any associated saline or borate deposits. Water wells immediately around Soda Lake are brackish, but this is attributed mainly to lack of circulation of underground water rather than to excessive salinity of the underlying rocks. Water from wells progressively distant from the lake contain much less salt. Core logs taken in 1952-53 by the U. S. Geological Survey in the Soda Lake basin show no solid beds of salt underlying the northern end of the playa, consequently the applicants have submitted only a theoretical discussion to support their contentions that these lands contain sodium or borate.

" *** The lands in the application /s/ are still classified as not prospectively valuable for sodium."

A mineral prospecting permit embracing lands included in outstanding desert land entries cannot be granted, unless the entries were impressed with mineral reservations. See, Bertram N. Beal, 51 ID 162 (1925). 30 U.S.C., Sec. 121-124 provides for the reservation of Sodium in desert land entries; however an entryman cannot be required to consent to such a reservation where the land is determined to be not prospectively valuable for Sodium. The Geological Survey having considered all the evidence submitted by appellants has reported that the lands are not prospectively valuable for Sodium; therefore, it is necessary to reject the mineral prospecting permit applications. Cf. Irma Gregg, A-27344 (August 9, 1956) and Bertram N. Beal, supra. While the latter cases are concerned with oil and gas and the oil and gas regulations, there is no equivalent regulation in the case of Sodium.

Therefore, the Manager's decisions rejecting the applications for land within outstanding unpatented entries not impressed with a sodium reservation were proper and are hereby affirmed.

It appears from the record that the S½ of lot 1 of NW¼ Sec. 30, T. 14 N., R. 9 E., S.B.M. applied for in Los Angeles 0142123 is patented land with no reservation of Sodium to the United States, the application to that extent is also rejected.

It also appears from the record that the desert land entries covering the W½ of Sec. 14, T. 14 N., R. 9 E., S.B.M. applied for in Los Angeles 0142125 and the E½ Sec. 35, T. 14 N., R. 9 E., S.B.M. applied for in Los Angeles 0142148 were cancelled or closed on October 31 and November 5, 1957, respectively. In the absence of any administrative or policy consideration to the contrary there appears to be no legal bar to the issuance of a prospecting permit for these lands if the existing entries have been cancelled even though the lands are classified as not prospectively valuable for said minerals.

When this decision becomes final, the case records will be remanded to the Land Office through the Bureau's State Supervisor, Los Angeles, California, for further consideration in accordance with this decision.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mrs. Lottie H. Knight (Certified Mail)
Mr. F. V. Lopardo (Certified Mail)
Mr. Clifford Leckrone (Certified Mail)
Betty Lopardo (Certified Mail)
Mr. Fred Nelson (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (21)
Appeals List No. 1
WJ

49261

MINING CLAIMS * 5 Discovery
* 6 Determination of Validity
* 9 Mill Sites

To constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine.

Loss of discovery on a mining claim serves to invalidate the claim.

A mill site is properly declared invalid where it was located and used in conjunction with a lode mining claim but the discovery on the claim was lost, and the mill site is no longer being used in connection with a valid lode claim.

United States v. George W. Kapusta et al., Contest 10-54, 10-55 (Sacramento) (March 2, 1959)

In reply refer to:
Contest Nos. 10-54 and
10-55 (Sacramento
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 2, 1959

Certified Mail
Return Receipt Requested

DECISION

United States	:	Mining Claim and Mill Site Location
	:	situated in sec. 16 T. 34 N.,
v.	:	R. 8 W., M.D.M., California
	:	
George W. Kapusta and	:	
Clifford J. Kapusta	:	
	:	

Decision Affirmed

Mr. Clifford J. Kapusta has appealed from a decision of the Hearing Examiner, dated February 11, 1958, declaring the Maple Quartz Mining Claim (amended) and Maple Mill site null and void.

The complaint in contest proceedings against the above identified mining claims charged that the land embraced in the claim is nonmineral in character and that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. The complaint against the mill site charged that the mill site has not been used for mining, milling or ore reduction purposes and is not an appurtenance to any known valid mining location. After a hearing the Examiner found the mining claim void for want of discovery; he held the mill site to be invalid because it is not appurtenant to any known valid mining location.

The appellant contends that a valid discovery has been demonstrated and that the mining location is valid. He asserts that the mill site has been used for milling purposes and is appurtenant to a valid mining claim.

The Government introduced testimony at the hearing to show that no vein or lode bearing valuable mineral deposits was exposed within the limits of the mining claim and that a person of ordinary prudence would not be warranted in the expenditure of time and money, with the reasonable prospect of success, in developing a valuable mine. It also showed that the mill site is not presently used for milling or reduction purposes. The evidence introduced by the contestees showed that the mining claim had been worked in the early 1920's and that mining operations during that period had been profitable. It was also shown that the mill site was used during that time, and probably until about 1935, for the processing of ore removed from the claim. The mine had been leased on a royalty payment basis from about 1925 to 1935, but no royalties were paid by the lessee since he never produced anything from the claim.

After a careful review of all the evidence we conclude that the claim was successfully operated by the owners thereof, and the mill used in conjunction therewith, until sometime in the mid 1920's, and that subsequent operations did not result in the recovery of any minerals of value.

It is well established that to constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the further expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). Even if there was a previous valid discovery of a valuable mineral (gold) deposit within the limits of the mining claim, and even if the commercial recovery thereof was an economic success, that original discovery and operation (terminating not later than 1935) will not serve to validate the claim at present if that discovery has been lost for any reason whatsoever. Waskey v. Hammer, 223 U.S. 85 (1912); Gwillam v. Donnellan, 115 U.S. 45 (1885). In order to sustain a location it is not sufficient merely to show that the claim may have been formerly valuable for minerals, but it must be shown as a present fact that the land is mineral in character and is valuable for its mineral content and a valuable discovery has been made within the limits of the claim. United States v. Margherita Logomarcini, 60 I.D. 371 (1949); United States v. Estate of Richard R. Lakin, A-27572 (June 12, 1958).

Oregon Basin Oil and Gas Co., 50 L. D. 253 (1923) makes clear that "discovery" upon which a claimant relies must be of a particular deposit, actually discovered, which warrants further expenditure of time and money in its development. The discovery, to satisfy the requirements of the law, means more than the showing only of isolated bits of mineral not connected with or leading to substantial value. United States v. Frank J. Miller, 59 I.D. 446 (1947).

In the instant case the testimony is clear that a fissure or lode, once discovered, has been worked out (depleted), and that although traces of mineralization are still found, those traces are not themselves connected with, nor do they lead to deposits of value. We, therefore, conclude, even though further prospecting may be warranted upon the subject mining claim, that a person of ordinary prudence would not be justified in further expenditures of labor or means in an endeavor to develop a paying mine. Under such circumstances a discovery of valuable mineral deposit has not been made and the mining claim is null and void. Cf. Cole v. Ralph, 252 U.S. 286 (1920).

The Department has held that a mill site is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it is associated. United States v. Langmade and Mistler, 52 L.D. 700 (1929); 30 U.S.C. sec. 42. Therefore, aside from the reason assigned by the examiner, since the mill site is not being used in connection with a valid lode claim, the mill site location is invalid. Cf. United States v. Reinartz, A-25808 (April 25, 1950).

Accordingly, the decision appealed from is affirmed.

The Messrs. Kapusta are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal, the adverse party to be served is:

Regional Solicitor
Office of the Solicitor
Department of the Interior
P.O. Box 4291
Sacramento, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Clifford J. Kapusta (Certified Mail)
George W. Kapusta (Certified Mail)
Regional Solicitor (Regular Mail)
Hearings Administrative Officer
Minerals Staff Officer (5)
Mr. John Sieker, Forest Service, U.S.D.A. (8)
Appeals List No. 1
BF

LEASABLE MINERALS * 1 Generally
(Other than oil and gas) * 5 Sodium

Lands situated within the Death Valley National Monument are not subject to the provisions of the Mineral Leasing Act.

LeRoy D. Petterson, Los Angeles 0152183
(March 10, 1959)

In reply refer to:

Los Angeles 0152183
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 10, 1959

Certified Mail
Return Receipt Requested

DECISION

LeRoy D. Petterson : Sodium

Manager's Decision Affirmed

Mr. Petterson has appealed from a decision of the Manager dated December 24, 1957, rejecting his application for a sodium prospecting permit under the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., secs. 261-263) on the basis that the lands sought, being situated within the boundaries of the Death Valley National Monument, are not subject to sodium prospecting. (43 CFR 191.2)

The appellant refers to January and April, 1933, copies of the "California Journal of Mines and Geology" to substantiate his claim that the area is rich in borax. He contends the area was excepted from the restrictions against mineral leasing and that leases are now being worked in the monument area.

It appears the appellant may have reference to mining operations for so-called lime borates which are subject to location under the mining laws, or to operations under previously patented mining locations. He is mistaken, however, in his belief that the lands are subject to leasing under the mineral leasing laws. The record shows that the Death Valley National Monument was created by the act of February 11, 1933 (47 Stat. 2554), under which the lands were not subject to the mineral leasing laws or to the mining laws; however, this act was amended by the act of June 13, 1933 (48 Stat. 139, 16 U.S.C. sec. 447), which extended the mining laws to lands in the monument area. The Department has held under the law, as amended, that the lands are not subject to leasing under the Mineral Leasing Act, supra. Owen and S. C. Montgomery (On Rehearing) 58 I.D. 21 (1942).

In view thereof, the Manager's decision is affirmed.

Mr. Petterson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Carl J Thomas

Acting Director

Enclosure

DISTRIBUTION:

Mr. LeRoy D. Petterson (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
EG

appeal to Sec: SD (Sac)
dismissed A-28086 7-17-59

MINING CLAIMS * 5 Discovery

Mining claims are properly declared null and void where no valuable discovery is demonstrated on the claims.

Geological inference or assessment work may not be substituted for an actual discovery.

The Department may inquire into the validity of mining claims in public lands at any time prior to issuance of patent after proper notice and upon adequate hearing.

United States v. Dickson A. Boyd, Contest No. 6786 (California)
(March 10, 1959)

RO

In reply refer to:
Contest No. 6786 (California)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 10, 1959

Certified Mail
Return Receipt Requested

DECISION

United States :
v. : Mining Claims
Dickson A. Boyd :

Decision Affirmed

The complaint in a contest against the Banjo Lode and Sumner No. 2 Lode mining claims of Dickson A. Boyd charged that the lands embraced within the claims are nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery under the mining laws. After a hearing duly held before a hearing examiner the examiner rendered a decision dated October 24, 1957, declaring the claims null and void for want of a valuable discovery. Mr. Boyd has appealed from that decision.

It is contended on appeal that the mining claimant was denied due process with respect to his claims since the examiner was without jurisdiction to hear the evidence or render decision thereon. It is contended also that the examiner was biased and not impartial in his consideration of the evidence. The appellant further asserts that the contestant failed to overcome the presumption of a valid discovery of valuable mineral deposits within the claims, and the claims are therefore valid.

The examiner was appointed and certified by the Civil Service Commission, Certification S-25466, Civil Service Regulation 34.3, in accordance with the Administrative Procedures Act (5 U.S.C. 1952 ed., sec. 1001 et seq.), and the contest record discloses all proceedings therein were duly conducted in accordance with that act. See Bureau decision, United States v. Keith V. O'Leary et al., Contest 5168 (Sacramento) of June 19, 1958.* It was held in the case cited that it requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair, and an allegation of subservience to the Director as investigating officer, and to the Solicitor as prosecuting officer, when unsupported by any evidence or proof, is not sufficient to disturb a decision by a duly appointed and certified hearing examiner (United States ex rel. DeLuca v. O'Rourke, 213 F.2d 759 (1954). It was held further that while the Department has no power to strike down any claim arbitrarily, so long as legal title remains in the Government, it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and if it be found invalid, to declare it null and void (Cameron v. United States, 252 U.S. 450 (1920)). No showing has been made by the appellant to establish personal bias or unfairness on the part of the examiner and the record fails to sustain the general allegations in this connection.

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*Affirmed by the Department, January 21, 1959, A-27791

The contestant introduced evidence at the hearing to show the lands in issue are not presently mineral in character and that a discovery of a valuable mineral deposit has not been made within the boundaries of either claim. It did this by introducing into evidence assay reports of the many ore samples which it removed from the claims and by introduction of evidence from expert witnesses to show that it is not reasonable for a man of ordinary prudence to spend further money and labor in an effort to establish a paying mine.

Upon the establishment by the contestant of a prima facie case that there had been no discovery of a valuable mineral deposit within the meaning of the mining laws, it was then incumbent upon the contestee to show that a valid discovery had been made within the limits of the claims. Cf. United States v. Everett Foster et al., 65 I.D. 1, 11 (1958).

The claims here involved were located in 1931. The appellant acquired them in 1949. He owns other mines nearby and contiguous to those in issue. It is contended by the contestee that the mineral character of the lands may be inferred by geologic inference because of the mineralization of surrounding lands; he caused testimony to be introduced to show the mineral value of the nearby lands. Both at the hearing and on appeal it was argued and contended that a present discovery on the lands need not be shown but that the validity of the locations can be questioned only as of the time when the locations were made. The appellant argues that the original discovery when the locations were made must be presumed to be valid, and since the claims have been held for not less than the prescriptive period provided by State law, no one may now attack their validity.

In United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955), the Department held as follows:

> "Under the mining laws 'valuable mineral deposits' in lands belonging to the United States are open to purchase (30 U. S. C., 1952 ed., sec. 22) but 'no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located' (30 U. S. C., 1952 ed., sec. 23) and no patent may be issued until the applicant has complied with all of the requirements of the mining laws (30 U. S. C., 1952 ed., sec. 29).

> "The discovery of the vein or lode is a prerequisite to the location and, a fortiori, to the issuance of a patent on any lode mining claim. 'To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes * * *.' East Tintic Consolidated Mining Claim, 40 L. D. 271, 273 (1911). Furthermore, the discovery, to satisfy the requirements of the law, means more than the showing only of isolated bits of mineral not connected with or leading to substantial values. United States v. Frank J. Miller, 59 I. D. 446 (1947). It is not until minerals have been found and the evidence is of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with the reasonable prospect of success, in developing a valuable mine, that the requirements of the law have been met. Castle v. Womble, 19 L. D. 455 (1894); Percy Field Jebson et al. v. Emmet F. Spencer and Tyler F. Woodward, United States, Intervener, 61 I. D. 161 (1953)."

A physical exposition of a vein or lode of mineral-bearing rock in place possessing a present or prospective value for mining purposes must be shown to establish validity of a mining claim. Assessment work may not take the place of discovery (Cole v. Ralph, 252 U.S. 286), nor may geological inference or belief as to the existence of minerals be substituted for an actual discovery. United States v. Frank J. Miller, A-24352 (February 24, 1947). Even if there has been a discovery of a valuable mineral deposit in 1931 the loss of that discovery for any reason whatsoever serves to invalidate the claims. Waskey v. Hammer, 223 U.S. 85 (1912); United States v. Margherita Logomarcini, 60 I.D. 371 (1949).

Section 2332, Revised Statutes (30 U.S.C. sec. 38) provides that a mining location may be patented upon the sole and exclusive showing that it has been "held and worked * * * for a period equal to the time prescribed by the statute of limitations for mining claims of the State * * * where the same may be situated, * * * in the absence of any adverse claim." This makes possession for the statutory period after discovery the equivalent of a valid location. See Donnelly v. United States, 228 U.S. 243 and Belk v. Meagher, 104 U.S. 279. This right does not dispense with the discovery requirements of the law. Cole v. Ralph, supra.

From a careful review of the record we conclude that there is no vein or lode of rock in place at present physically exposed and possessing a present or prospective value for mining purposes. In the circumstances the mining claims, subject of this appeal, are invalid. Cf. United States v. Estate of Richard R. Lakin, A-27572 (June 12, 1958).

Accordingly, the decision appealed from, declaring the subject mining claims null and void, is affirmed.

Mr. Boyd is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse parties to be served are:

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Acting Director

Enclosure

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Mr. Charles T. Woolverton (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
BF

Reversed & Remanded,
A-28095,
11-16-59

LO(Sac)

MINING CLAIMS * 3 Contests
* 16 Application for Patent

An applicant for a mineral patent has the burden of proof to establish the validity of his claim but the Government may inquire into the validity of the claim at any time prior to the actual issuance of patent. Once a contestant has established, prima facie, the invalidity of a claim, it is incumbent for the contestee to proceed with the evidence and establish the validity of his claim.

Where material evidence concerning discovery on a claim is erroneously ruled as inadmissable the case record will be remanded for further hearing and a new decision.

Where the parties to a contest proceeding stipulate to jointly take ore specimens and submit them to assay, the assay reports are properly for the consideration of the Examiner when submitted after the close of the hearing.

United States v. Charles R. Cartmel, Contest 5252 (Sacramento)
March 20, 1959

L D

In reply refer to:

Contest No. 5252 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 20, 1959

DECISION

United States :
v. : Mining Claim
Charles R. Cartmel :

Decision Reversed
Case Remanded

Charles R. Cartmel has appealed from a decision of the Hearing Examiner, Sacramento, California, dated September 3, 1957, holding null and void for lack of discovery the Gold Wedge Lode mining claim embracing land in Sec. 34, T. 3 N., R. 16 E., M.D.M., California. In his decision the Hearing Examiner also rejected Mr. Cartmel's application for patent to the claim.

The land involved is located within the Stanislaus National Forest. By letter dated May 31, 1956, the Forest Service, United States Department of Agriculture, protested against the issuance of patent to the Gold Wedge Lode claim on the ground that no discovery of a vein or lode containing mineral of such quantity and in such quality as to justify a reasonably prudent person in the expenditure of money and effort in an attempt to develop a paying mine has been made within the limits of the claim.

On the basis of the evidence presented at a hearing held on June 11, 1957, the Hearing Examiner concluded that no discovery has been made within the limits of the Gold Wedge Lode claim sufficient to meet the requirement of the statutes, nor has there been such a discovery that would cause a prudent man to expend his time, effort, and monies to the end that he could develop a paying mine.

The appellant alleges no error in the Examiner's statement of the issues and law involved. He contends, however, that the conduct of the hearing was prejudicial to him because the burden of proof, to establish the validity of the claim, was erroneously cast upon him. He further alleges that the testimony of the contestant's witnesses was accepted at face value, while the evidence offered for the contestee was ignored or not given sufficient weight.

At the hearing the contestant introduced evidence to show there exists on the claim here involved quartz stringers varying in width from a feather's edge to a 6 to 8 inch maximum and that although gold is recoverable from those stringers, the recovery value is such that a prudent man would not be justified in expending effort and means to the end that he could develop a paying mine.

Evidence was introduced by the contestee tending to show that since the claim is located in the East Belt, the land is, by geological inference, valuable for gold. The contestee testified concerning gold mining activities in the area and on his contiguous patented claim. He attempted to establish that mining operations on the contested claim could be successful if costs were reduced to the same level as in the depression years of 1933 and 1934, or even the same as in 1942. He also opined that the claim would have a future operational value because of a hoped for increase in the price of gold. He attempted to show that a vein disclosed in a tunnel running between the Gold Wedge and his patented claim, the Red Cloud, had yielded five tons of ore in the vicinity of the boundary between the claims, and that the ore was milled and yielded approximately $100 at the mint. He stated that about three tons of the ore had been recovered from the Red Cloud and about two tons from the Gold Wedge. The examiner found this testimony to be irrelevant because Mr. Cartmel could not accurately testify as to the exact tonnage and values recovered from each claim.

At the close of the hearing the parties stipulated that representatives of each would visit the claim for the purpose of obtaining samples for further assay. This was done. Additional ore specimens, other than the joint samplings, were taken by the parties and assay reports thereof were also submitted.

An applicant for a mineral patent has the burden of proof to establish the validity of his claim and his right to patent. The Government has the right to inquire into the validity of the claim at any time prior to the actual issuance of patent. Union Oil Company of California et al., 65 I.D. 245 (1958). A contest proceeding is an inquiry into the validity of the claim. "Under the charges brought against the claims, the contestees had the burden of showing that they had made a valid discovery within the limits of the claims. Although the Government initiated the charges and had the initial burden of sustaining at least the first charge - that there had been no discovery - if it were to prevail in the contests, once the Government had produced evidence to show that no discovery had been made, it was up to the contestees to overcome that evidence." United States v. Everett Foster et al., 65 I.D. 1 (1958). It is clear that the proceedings were in all respects normal, the burden of going forward with the evidence shifted to the contestee after the contestant had made a prima facie case.

Contrary to the examiner's ruling excluding the mint reports for the five tons of ore removed from the vein running between the Gold Wedge and Red Cloud claims, we find that such evidence is admissable and probative to the issue involved. The presumption is strong that if a vein yielding high grade ore is found exposed in a tunnel, that the values would continue and not stop at an arbitrary boundary line dividing the two claims; nor can we presume that a miner would mix two tons of worthless ore with three tons of ore of high value. This evidence, rebuttable by the contestant, was clearly admissable and the contestee should have been allowed to fully develop it. (The developed testimony should have been seriously considered in the decision below.) The exclusion thereof, in itself, constitutes error requiring a reversal of the decision appealed from.

The appellant's appeal brief remarks concerning the probative value of assay reports submitted after the close of the hearing. First: joint sampling was agreed upon at the hearing. Joint samples were taken and assay reports submitted for the examiner's consideration. It follows that so long as the parties stipulate to the acceptability of the samples that the reports thereon are properly considered by the hearings officer. Part VIII of the decision below evaluates the report of the joint samples. Second: The additional assay reports of samplings, other than the joint samplings, submitted by each of the parties cannot be corroborated by supporting testimony. Those reports, although admissable in an administrative proceeding, are not entitled to any weight. The consideration given those reports is irregular and constitutes reversable error. Cf. *United States* v. *Al Sarena Mines, Inc.*, 61 I.D. 280 (1954).

In view of the foregoing, the decision appealed from is reversed and the case record remanded for further proceedings and decision in accordance with the opinions expressed herein. The mineral patent application is reinstated and is suspended pending the outcome of the contest proceeding.

Edward Woozley
Director

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Hearings Administrative Officer
Appeals List No. 1
BF

appeal to Sec
affirmed A-28127 1-28-60

LO Sec/

MINING CLAIMS * 5 Discovery
* 8 Lode Claims

In order to establish a valid discovery for materials of widespread occurrence it must be shown that the materials can be extracted, removed and marketed at a profit.

A discovery on a mining claim after the lands embraced therein have been withdrawn from mineral location will not serve to validate the location.

Mining claims located for limestone are properly declared null and void where contestant, by a preponderance of the evidence, showed that there was no actual market for limestone before the date of withdrawal of the lands from entry, and the contestees, locators of the mining claims, failed to rebut that evidence and failed to show that the material sought to be mined could be extracted, removed and marketed at a profit prior to the date of withdrawal.

A lode location will not sustain a placer location. A lode location on a bed of limestone is not authorized under the provisions of the mining laws.

United States v. Charles L. Seeley and Gerald F. Lopez, Contest 5264
(March 31, 1959) (Sacramento)

RO

In reply refer to:

Contest 5264
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 31, 1959

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DECISION

United States v. Charles L. Seeley and Gerald F. Lopez	)	Mining Claims

Decision Affirmed

Messrs. Seeley and Lopez have appealed from a decision, dated November 4, 1958, declaring the Corona Blanca, Wizard Cove, Thunder Bird, Wizard Cove Extension, and Diamond Head lode mining claims, situated in secs. 7 and 18, T. 22 S., R. 6 E., and sec. 12, T. 22 S., R. 5 E., M.D.M., California, null and void. The decision was premised on a finding that a discovery, within the meaning and contemplation of the mining laws, of a valuable mineral deposit was not made on or before March 2, 1955.

The lands described above, within the Los Padres National Forest, were located as lode mining claims in March and April, 1954. Those same lands were included in a special land use permit, issued to the Army, on March 2, 1955. The area involved was transferred to Army jurisdiction under the act of July 26, 1956 (70 Stat. 656), effective June 4, 1957. After the mining claimants instituted legal proceedings to gain access to the located lands (and for other purposes) a contest proceeding, inquiring into the validity of the claims, was initiated by the Forest Service. It appears that a final decision herein is anticipated prior to the continuance of litigation.

It was stipulated and agreed, between the parties at a prehearing conference, that the issues be limited to whether a valid discovery of limestone had been made.

In United States v. Strauss et al., 59 I.D. 129 (1945) it was held that products of widespread occurrence such as limestone may be

locatable. But whether particular deposits constitute "* * * valuable mineral deposits within the contemplation of the mining laws and whether the lands containing them are therefore subject to location and purchase under the mining laws are questions of fact, held to depend upon the marketability of the deposit. The rule long laid down by both the courts and the Department requires that to justify his possession the mineral locator or applicant must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed, and disposed of at a profit. * * *" Also, it has been held that discovery may be established where minerals of widespread occurrence are shown to have a present market value.
United States v. Black, 64 I.D. 93 (1958). The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. M. W. Mouat et al., 61 I.D. 289 (1954) and cases cited.

One in possession of public land open under the mining laws to location retains possession against all, except the Government, while diligent in his effort to discover valuable minerals therein. Meanwhile, he is on the land with the tacit consent of the Government. However, when that consent is withdrawn, a discovery after withdrawal will not serve to validate the claim; the discovery must have preceded the withdrawal. Cameron v. United States, 252 U.S. 450 (1920); Cole v. Ralph, 252 U.S. 286, 296 (1920); United States v. Wilmot D. Everett et al., A-27010 (October 17, 1955). Where a location is perfected under law, it is property in the full sense of the word but where a location is not perfected the locator does not have the right of exclusive possession, the claim is not property - in effect, there is no claim. Cf. Wilbur v. Krushnic, 280 U.S. 306 (1930).

The appellants have agreed that the validity of the claims depend upon the marketability of the product (limestone). They contend that the Government is "estopped to deny the validity of the claims in contest on the grounds of failure to show development or marketability since access as required by potential buyers, a condition precedent to purchase or development has been denied by the Government." They also requested a further hearing to inquire into (1) whether there was "direct and continuing interference" preventing them from entering the claims for the purposes of development, (2) whether they have the right to exclusive possession of the claims and (3) whether a valid discovery has been made.

The sole purpose of this contest proceeding is to inquire into the validity of the claims. The evidence adduced at the hearing is sufficient to pass upon that question; since the appellants have failed to show that there is any newly discovered evidence which may warrant a change from the decision below or have direct bearing on the question of discovery a new hearing to inquire into the validity of discovery would be a rehearing and since the parties already have had their day in court the request is denied. Further, the question concerning "direct and continuing interference" is not within the province of this Bureau; the right of exclusive possession is established only if the claims are valid.

The record before us indicates that the Army and Forest Service believed that the lands had been previously permitted to the Army and the Army had been in possession thereof for military purposes prior to 1954. The use of the lands, apparently with the tacit consent of the Forest Service, in and of itself, was an appropriation of public lands for public purposes; that appropriation, in our opinion, severed the lands from the general mass of the public domain and reserved it for their purposes. Cf. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839). It follows, that the lands, subject of this appeal were not at time of the locations, nor at any time since, subject to mineral entry.

Even if the lands were open to location prior to March, 1955, the use permit issued that month would itself effect a withdrawal of the lands, or at least sanction the prior appropriation from and after that date. If the lands were not effectively withdrawn from mining location prior to June 4, 1957, the transfer of that date would serve as a withdrawal. Cameron v. United States, supra. Even if the lands were locatable prior to June 4, 1957, the claims would be invalid if not perfected by a valid discovery. However, regardless of these factors, we will assume, for the purpose of the ensuing discussion, that the lands were open to mining location until June 4, 1957. The record is complete and sufficient on which such determination may be made.

No limestone has ever been mined or sold from the subject claims; that the limestone was marketable on June 4, 1957, cannot be established by actual operations and sales at a profit is conceded. We are, therefore, presented with the question concerning whether the deposit could have been extracted, removed and marketed at a profit before that date. United States v. Everett Foster et al., 65 I.D. (1958).

The testimony of the hearing was accurately summarized in the decision below. In brief, the contestant showed that by reason of inaccessibility, distance from market, initial expense of development, lack of existence of adequate present demand and other factors that the deposits cannot be mined, removed and disposed of at a profit. The contestees, in an effort to rebut that evidence, sought to prove that the limestone, if quarried, could be marketed at a profit. Even if the claimants were denied access to the claims, as alleged, we must presume that they were nevertheless diligent in their efforts to promote the sale of limestone and to interest prospective buyers in the purchase thereof. The contestees showed that they had been diligent in an effort to find a market for the product; they showed that at least nine potential users of limestone had been contacted in an effort to market the product. Eight of the "prospective" customers indicated that they were not interested in the purchase of limestone from the contestees. The proofs to that effect were submitted by the contestees and offered in evidence.

Whether the ninth party would purchase had not been determined at the date of the hearing. Counsel requested a postponement to await the outcome of negotiations with that party stating "Well, your Honor, we just found [named] Company. We just discovered them. * * * I think we are entitled to this opportunity. Certainly, we have been confronted with every obstacle. We can testify to ardent efforts in every direction. We just discovered [the named company] the latter part of April. We have been pursuing it avidly ever since, * * *." (Tr 173) Although the postponement was not granted the Examiner kept the record open pending a purchase commitment from the company alleged to be interested. The Examiner was informed, by letter dated July 14, 1958, from that prospect company that it was not presently interested in the purchase of or interested in entering negotiations involving the sale of material from the claims.

The sum total of the contestees' assertions concerning marketability of limestone appears to be comprised of mere self-serving declarations of hopes, beliefs and expectations that if they are left in undisturbed possession of the claims the material sought to be mined would some day be valuable and marketable. Hopes and expectations cannot be substituted for a showing of an actual market; nor may the conjectural market envisaged by the claimants be interpreted as being an actual market on June 4, 1957. Therefore, since the limestone deposits could not be extracted, removed and marketed at a profit at any time prior to June 4, 1957, the subject claims are null and void and it is not necessary to determine whether the lands were otherwise subject to location prior to that date.

Although our decision is limited to a finding concerning validity of discovery, i.e., marketability of the materials for which the claims were located, it is proper to remark concerning another point that casts doubt upon the validity of the locations.

The mining claims involved in this appeal were located as lode claims. It appears to have been the intention of the locators to quarry the material with bulldozer and shovel. It is well established, however, that a lode location on a bed of limestone is not authorized under the provisions of the mining laws. Long v. Isaksen, 23 L.D. 353 (1896); Wheeler et al. v. Smith, 23 L.D. 395 (1896); Shepherd v. Bird et al., 17 L.D. 82 (1893); Cf. Vivia Hemphill, 54 I.D. 80 (1932) and cases cited. Therefore, since a lode discovery will not sustain a placer location, it appears that for that reason alone the subject mining claims may be invalid. Cole v. Ralph, supra; Layman et al. v. Ellis, 52 L.D. 714 (1929).

Accordingly, the decision appealed from is affirmed.

Messrs. Seeley and Lopez are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

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Edward Woozley
Director

Enclosure

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Geological Survey (3)
Appeals List No. 1
BF

LO (Sac)

min

OIL AND GAS * 9 Lands Subject to Leasing

CLASSIFICATION * 4 Lands Available for Leasing (Sodium)

A sodium prospecting permit application for land included within a desert land entry not impressed with a sodium reservation is properly rejected where the land is found to be not prospectively valuable for sodium. The findings of the Geological Survey that the land is not prospectively valuable, in the absence of evidence to the contrary, is binding upon the Bureau of Land Management.

H. Stanton Hill, Los Angeles 0146152
(April 3, 1959)

DEPT. OF INTERIOR
SACRAMENTO, CAL.
APR 20 10 08 AM 1959
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

Ro

In reply refer to:
Los Angeles 0146152
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 3, 1959

Certified Mail
Return Receipt Requested

DECISION

H. Stanton Hill	:	Sodium

Decision Affirmed

Mr. H. Stanton Hill has appealed from a decision of the Manager, dated September 2, 1958, rejecting his above-noted sodium prospecting permit application, filed December 10, 1956, under section 23 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 261), as to the SW¼ sec. 25, T. 29 S., R. 39 E., M.D.M., California, because the land is embraced in Desert Land Entry Los Angeles 0101613, which was allowed prior to the date the appellant filed his application, and is not subject to a reservation of sodium to the United States under the Act of July 17, 1914, since the Geological Survey has reported that the land is not prospectively valuable for sodium.

The appellant contends that the land is prospectively valuable for sodium compounds and in support thereof refers to an article in California State Division of Mines Bulletin 160, 1952, page 46.

In a supplemental report, dated March 12, 1959, Geological Survey reported that the lands in the appellant's application are still properly classified as not prospectively valuable for sodium.

A mineral prospecting permit embracing lands included in outstanding desert land entries cannot be granted, unless the entries were impressed with mineral reservations. See Bertram N. Beal, 51 L.D. 162 (1925). 30 U.S.C., secs. 121-124 provide for the reservation of sodium in desert land entries; however, an entryman cannot be required to consent to such a reservation where the land is determined to be not prospectively valuable for sodium. The Geological Survey, having considered all of the evidence submitted by the appellant, has reported that the lands are not prospectively valuable for sodium. Therefore, it is necessary to reject the mineral prospecting permit application. Cf. Irma Gregg, A-27344 (August 9, 1956) and Bertram N. Beal, supra.

Therefore, the Manager's decision rejecting the application for land within an outstanding unpatented entry not impressed with a sodium reservation was proper and is hereby affirmed.

Mr. Hill is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, then the adverse party to be served is as follows:

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Edward Woozley
Director

Enclosure

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Appeals List No. 1
LS

LO(Sac)

LEASABLE MINERALS * 1 Generally
(Other than Oil and Gas) * 5 Sodium

Where a provision in a patent, issued under a law authorizing the conveyance of nonmineral lands only, purports to exclude therefrom "mineral lands" without any specific description thereof, such a provision is null and void and the patentee obtains a full title to the lands described in the patent, including the minerals therein, and such title cannot be vitiated by any subsequent discovery of minerals on the lands so patented. Sodium prospecting permit applications for such lands are properly rejected.

R. H. Stiles et al., Los Angeles 0154234, etc.
(April 22, 1959)

LO

In reply refer to:

Los Angeles 0154234
0154178
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 22, 1959

Certified Mail
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DECISION

R. H. Stiles
W. E. Strangman

: Sodium Prospecting Permit Applications

Decisions Affirmed

The above-named parties appealed from separate decisions of the Manager, dated May 5, 1958, rejecting[1] their sodium prospecting permit applications for the reason that the lands involved are railroad lands, granted without reservation of minerals to the United States.

The records show that the lands were included in Patent No. 143 dated December 6, 1905, of lands selected by the Southern Pacific Railroad Company under the act of July 27, 1866 (14 Stat. 292). The act provided that "all mineral lands be and the same are hereby excluded from the operations of this act."

The appellants state, in effect, that the Congress intended that the minerals be reserved in the railroad grant lands. They state that bonds will be posted to protect the surface rights in the event permits are issued to them.

The wording of the act of July 27, 1866 (14 Stat. 292) was interpreted in the case of Burke v. Southern Pacific Railroad Company, 234 U.S. 669 (1914), wherein Mr. Justice Van Devanter, in delivering the opinion of the court, stated that the exclusion of mineral lands by the statute "was not a mere reservation of minerals, but an exclusion of mineral lands, coupled with a provision that the company should receive other lands, not mineral, in lieu of them" (page 683); that "as it plainly was not intended that patents should issue for excluded lands, to which the company was not to have any right or title, the direction respecting the issue of patents necessarily carried with it the power and the duty of determining in every instance whether the land came within the terms of the grant, or for any reason was excluded from it, and of giving appropriate effect to the result by granting or refusing a patent" (page 685); that "After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals" (page 688); and that the mineral land exception in a patent to a railroad company under a grant which excludes mineral lands is void (page 710).

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[1] In part

In deciding a recent appeal raising identical issues, as to Union Pacific Railroad grant lands, the Department, citing Burke v. Southern Pacific Railroad Co., supra, noted that the effect and interpretation of the clause, excluding mineral lands, has "long since been finally established." Sewell Thomas et al., A-27016, A-27106, A-27113 (December 22, 1954). When this case was tested in Federal Court, the same conclusion was reached. Thomas v. Union Pacific Railroad Co., 139 F. Supp. 588, 592-596, affirmed by the Court of Appeals, per curiam on the basis of the opinion of the District Court, 239 F. 2nd 641.

The facts and principles of the cases on appeal parallel those of the cases cited above and hence the decisions of the Department and of the Courts are controlling and the determination of the Manager that the United States has no jurisdiction over the lands or the mineral deposits therein is deemed to be correct. Therefore, the decisions rejecting the applications for sodium prospecting permits are affirmed.

R. H. Stiles and W. E. Strangman are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

J P Beirne
Acting Director

Enclosure

DISTRIBUTION:

Mr. R. H. Stiles (Certified Mail)
Mr. W. E. Strangman (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (6)
Appeals List No. 1
WJ

LA (Sac)

MINING CLAIMS * 3 Contests

Where contestees fail to interpose an answer after due service of a complaint in a contest proceeding, the charges of the complaint must be taken as confessed and decision rendered accordingly. (43 CFR 221.64 and 221.65)

William M. Wallace, Jr., and Mrs. Wanda Wallace, Contest 5369 (Sacramento) (April 29, 1959)

In reply refer to:

Contest 5369 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 29,1959

Certified Mail
Return Receipt Requested

DECISION

William M. Wallace, Jr., and : Mining Claim
Mrs. Wanda Wallace :

Decision Affirmed

Mr. and Mrs. Wallace have appealed from a decision, dated May 26, 1958, declaring the Doggie Placer mining claim, situated on the whole of lot 81, sec. 18, T. 33 N., R. 9 W., M.D.M., California, and embracing 12.84 acres, null and void.

A contest proceeding, No. 5369, was instituted against the subject claim by service of a complaint upon the contestees on March 31 and April 1, 1958. The complaint charged (1) that the land embraced within the claim is nonmineral in character and (2) that minerals have not been found within the limits of the claim, in sufficient quantities to constitute a valid discovery. The contestees failed to appear or answer. The Manager, more than 30 days thereafter, therefore, considered the charges as confessed and rendered the decision from which appeal was taken.

Lot 81 was located as a mining claim by Mrs. Wallace in 1953. Mr. Wallace filed homestead application (Sacramento 047098) for the same land on March 17, 1953. On March 28, 1955, the State of California filed an exchange application, Sacramento 049949, covering the same land. Neither the homestead nor exchange applications have been allowed to date.

The appellants assert that although they would rather homestead the land than mine it, they do not concede that the land is not mineral in character. They also state that they have erected a residence and other improvements on the land and conduct farm operations upon it.

The regulation, 43 CFR 221.64, provides that a contestee must file answer to a complaint within 30 days after service thereof. "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." 43 CFR 221.65(a). The Manager, in accordance with the mandatory provisions of the regulations, considered the default as an admission of the validity of the charges and did properly declare the claims null and void. No error is alleged in the decision appealed from, nor have the appellants advanced any reasons that would indicate that the decision would be otherwise if their default was waived and if they be permitted to interpose an answer.

Accordingly, the decision appealed from is affirmed.

William M. Wallace, Jr., and Mrs. Wanda Wallace are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served with notice thereof is:

State Lands Commission
Division of State Lands
1403 Twelfth Street
Sacramento 14, California

The decision herein in no way constitutes a classification of the lands under the Taylor Grazing Act. When this decision becomes final, the homestead and exchange records will be returned through the Bureau's State Supervisor for further processing.

Earl J Thomas
Acting Director

Enclosure

DISTRIBUTION:

Mr. & Mrs. William M. Wallace, Jr. (Certified Mail)
State Lands Commission (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Case Records, Sacramento 047098 and 049949
Appeals List No. 1
BF

LO(Sac)

MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under the act of July 23, 1955 (30 U.S.C. sec. 613(a)) is the maximum time allowable for such purpose, and it may not be extended by the Department.

Lester G. Poage, PL 37-23 (Sacramento)
(May 11, 1959)

In reply refer to:
PL 37-23 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 11, 1959

Certified Mail
Return Receipt Requested

DECISION

Lester C. Poage	Rattlesnake and Booth Point Mining Claims situated in Sec. 3, T. 18 N., R. 11 E., M.D.B & M., California

Decision Affirmed

Mr. Poage has appealed from a decision of November 8, 1958,* rejecting his verified statement, filed October 2, 1958, under section 5 of the act of July 23, 1955 (30 U.S.C. sec. 613(a)). The statement was rejected for the reason that it was not timely filed, that is, within 150 days from March 13, 1958, the date of first publication of notice that the filing of such a statement was required.

The appellant admits that the notice was not timely filed. His appeal, in effect, is a prayer for relief petitioning that his statement be accepted for filing, because of certain mitigating circumstances.

The Department has held that the 150-day statutory period in which to file under the act of July 23, 1955 is the maximum time allowable for such purpose, that such period may not be extended by the Department and that a verified statement required under the act is properly rejected and the use of surface resources restricted to the mining claimants where the required statement is not timely filed. Hines Gilbert Gold Mines Company, 65 I.D. 481 (A-27732, November 13, 1958). It follows, since the required statement was not timely filed, that the decision rejecting the statement was correct and proper.

Accordingly, the decision appealed from is affirmed.

---

* Mr. Poage submitted $15.00 appeals fee. The proper fee is $5.00 for each claim. When this decision becomes final the appellant may apply to the Land Office, 4th and J. Streets, Sacramento 14, California, for refund of the $5.00 excess payment.

Mr. Poage is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Lester G. Poage (Certified Mail)
Mr. John Sieker, Forest Service, United States Dept. of Agriculture (8)
Minerals Staff Officer (5)
Appeals List No. 1
BF

LO(Sac)

LEASABLE MINERALS * 1 Generally

Station grounds rights-of-way to railroad companies are considered to be easements only, no right to the minerals underlying such lands having been conveyed. Such lands are therefore available for filing of sodium prospecting permit applications.

Carl G. Gebhart et al., Los Angeles 0145352, etc.
(May 11, 1959)

20

In reply refer to:

Los Angeles 0145278
0145352
5.04g
May 11, 1959

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

DECISION

Carl G. Gebhart
Albert F. Dunlap

Sodium Prospecting Permit Applications

Decisions Reversed; Cases Remanded

Messrs. Carl G. Gebhart and Albert F. Dunlap appealed from separate decisions of the Acting Manager dated April 15 and April 21, 1958, respectively, rejecting their above-noted sodium prospecting permit applications as to lands previously granted as station grounds to the Death Valley Railroad (approved February 14, 1923) insofar as application 0145352 is concerned, and to the Tonopah and Tidewater Railroad Company (approved June 26, 1907) insofar as application 0145278 is concerned, both grants having been made under the act of March 3, 1875 (43 U.S.C., secs. 934-939).

In their respective appeals, the appellants state the lands are not used as station grounds, and further, that the rights-of-way for station grounds do not preclude prospecting and underground development of sodium compounds in the lands.

The act of March 3, 1875, supra, clearly granted only an easement and not a fee, and conferred no right to the mineral deposits underlying the rights-of-way. Great Northern Railroad Co. v. United States, 315 U.S. 262.

It also appears from the record that the right-of-way for station grounds of Tonopah and Tidewater Railroad Company approved June 26, 1907, was cancelled January 25, 1924, and thus constitutes no further obstacle to the allowance of application Los Angeles 0145278.

In view thereof, the decisions of the Acting Manager were incorrect, and they are hereby reversed. The cases are being remanded to the Land Office, through the Bureau's Assistant to the State Supervisor, Los Angeles, California, for further appropriate consideration of the sodium prospecting permit applications.

Edward Woozley
Director

Distribution - Page 2

DISTRIBUTION:

Assistant to the SS (Los Angeles) w/case records
Mr. Carl G. Gebhart (Regular Mail)
Mr. Albert F. Dunlap (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
WJ

LQ Sac)

LEASABLE MINERALS * 5 Sodium

(Other than oil and gas)

Where the lands are not available for the filing of sodium prospecting permit applications at the time an application is filed, the application is invalid and must be rejected. The fact that the lands later become available for such filing, prior to the processing of the application previously filed, cannot serve to validate the application, since the validity of an application is determined as of the time it is filed.

John Henry Carter, Los Angeles 0146377
(May 11, 1959)

In reply refer to:
Los Angeles 0146377
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 11, 1959

Certified Mail
Return Receipt Requested

DECISION

	:	
John Henry Carter	:	Sodium Prospecting Permit Application
	:	

Decision Affirmed

Mr. John Henry Carter appealed from the Acting Manager's decision of May 23, 1958, rejecting his sodium prospecting permit application filed December 21, 1956, for the reason that the lands applied for were embraced in an outstanding 2-year sodium prospecting permit, Los Angeles 0108079. The decision recited that the sodium prospecting permit was issued August 22, 1955, and was cancelled upon relinquishment August 20, 1957, record notations as to the cancellation being made on the tract book records of the Land Office on the same day. The decision recited further that Charles J. Samples filed sodium prospecting permit application, Los Angeles 0152602, for the same lands.

In his appeal Mr. Carter states he was in constant touch with the Land Office and at no time was he notified of the cancellation of the prior permit or of the filing of another application for the same lands. He contends that the great lapse of time since he filed his application led him to assume his application was in order and he believes his application should have priority and that a permit should be issued to him.

Lands included in an outstanding sodium prospecting permit, as the lands in question were when the appellant's application was filed, are not available for such filing; and applications for sodium prospecting permits on such lands are properly rejected. J. D. Archer et al., A-27451 (June 24, 1957).

Where the lands are not available for the filing of sodium prospecting permit applications at the time an application is filed, the application is invalid and must be rejected. The fact that the lands later become available for such filing, prior to the processing of the application previously filed, cannot serve to validate the application. The validity of an application is determined as of the time it is filed. Cf. Elwyn C. Hale, 62 I.D. 19 (1955).

As to the availability of the lands for such filing upon cancellation of a sodium prospecting permit, the pertinent regulation, 43 CFR 195.11, provides: "Upon cancellation of a sodium permit for any reason, the land will not be open to sodium permit applications until the cancellation is noted on the records of the land office."

The decision appealed from was correct, and it is hereby affirmed.

Mr. Carter is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If appeal is taken by Mr. Carter, then the adverse party to be served is:

Charles J. Samples
610 S. Broadway
Los Angeles, California

Director

Enclosure

DISTRIBUTION:
Mr. Joseph Lewis, Attorney at Law (Certified Mail)
Mr. John Henry Carter (Regular Mail)
Mr. Charles J. Samples (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
WJ

LO(Sac)

LEASEABLE MINERALS (Sodium) * 1 Generally
* 5 Sodium

PUBLIC LANDS * 9 Patent of Public Lands

Where a provision in a patent issued under a law authorizing the conveyance of nonmineral lands only, purports to exclude therefrom "mineral lands" without any specific description thereof, such a provision is null and void and the patentee obtains a full title to the lands described in the patent including the minerals therein and such title cannot be vitiated by any subsequent discovery of minerals on the land as patented.

Lands patented without reservation of minerals to the United States is not subject to sodium prospecting permits.

Paul W. Arvidson, Los Angeles 0154229
(May 11, 1959)

ho

In reply refer to:
Los Angeles 0154229
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 11, 1959

Certified Mail -
Return Receipt Requested

DECISION

Paul W. Arvidson : Sodium Prospecting Permit Application

Manager's Decision Affirmed as Modified
Case Remanded

Mr. Arvidson appealed from the Manager's decision which partially rejected his Sodium prospecting permit application for the reason that the lands are embraced in railroad grants and Homestead patents which were issued without mineral reservation to the United States.

In his appeal, appellant states that the grant to the railroad excluded mineral rights and the act allowing the grant was interpreted by the courts excluding mineral rights. As to the Homestead patents, appellant states that the lands are incapable of cultivation and no improvements were made thereon as contemplated by the act upon which homestead entries were allowed. He states that a bond will be posted to insure the surface rights in the event a permit issues.

The records show that the lands are embraced in Patent No. 143 dated December 6, 1905 to the Southern Pacific Railroad under the Act of July 27, 1886 which provided that "all mineral lands be and the same are hereby excluded from the operations of this act", and in Homestead entries 030066 patented to Charles A. Goodwin 26 April 1921, Patent No. 804432, 030065 patented to Vincent M. Goodwin May 26, 1921, patent No. 807852 and 045494 patented to Robert D. Jones May 23, 1935, patent No. 1075901 with no reservation of Minerals to the United States.

As to these lands embraced in the Railroad Grant without mineral reservations, the wording of the Act of July 27, 1866 (14 Stat. 292) was interpreted in the case of Burke v. Southern Pacific Railroad Company 234 US. 669 (1914), wherein Mr. Justice Van Devanter, in delivering the opinion of the court, stated that the exclusion of mineral lands by the statute "was not a mere reservation of minerals, but an exclusion of mineral lands, coupled with a provision that the company should receive other lands, not mineral, in lieu of them" (page 683): That "as it plainly was not intended that patents should issue for excluded lands, to which the company was not to have any right or title, the direction respecting the issue of patents necessarily carried with it the power and the duty of determining in every instance whether the land came within the terms of the grant, or for any reason was excluded from it, and of giving appropriate effect to the result by granting or refusing a patent" (page 685); that "After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals" (page 688); and that the mineral land exception in a patent to a railroad company under a grant which excludes mineral lands is void (page 710).

In deciding a recent appeal involving identical issues as to Union Pacific Railroad grant lands, the Department, citing Burke v. Southern Pacific Railroad Co., supra, noted that the effect and interpretation of the clause, excluding mineral lands, has "long since been finally established." Sewell Thomas, et al., A-27113 (December 22, 1954). When this case was tested in Federal courts, the same conclusion was reached, Thomas v. Union Pacific Railroad Co., 139 F. Supp. 588, 592-596, affirmed by the court of appeals, per curium on the basis of the opinion of the District Court 239 F 2nd 641.

As to the Railroad grant, the facts and principles of the case on appeal parallel those of the cases cited above and hence the decisions of the Department and of the courts are controlling and the determination of the Manager that the United States has no jurisdiction over the lands or the mineral deposits therein is deemed to be correct.

As to the lands embraced in Homestead patents without mineral reservations, there is no provision in the Mineral Leasing Act, as amended, providing for the leasing of property of which the United States does not own the mineral rights. Since title passed from the United States to the subject lands without a mineral reservation, the Bureau is without authority to issue a Sodium prospecting permit. Nor is there any obligation on the part of the Federal government to try to procure title to the mineral rights in the land for the benefit of the appellant.

It is to be noted that the Manager's decision failed to consider the subject application as to S½ Sec. 30, T. 11 N., R. 6 W., N½ Sec. 3 and N½ sec. 4, T. 10 N., R. 6 W., S.B.M., California. The records show that the lands are embraced in prior filed sodium prospecting permit applications. The application to this extent is suspended pending determination of whether the prior applications are entitled to a sodium prospecting permit. See John E. Miles, 62 I.D. 135 (1955).

Accordingly, the decision of the Manager is correct, and it is hereby affirmed. When this decision becomes final the case file will be remanded to the Land Office, through the Bureau's State Supervisor, Los Angeles, California for further consideration concerning those lands embraced in prior filed applications.

Mr. Arvidson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Hon. Clair Engle, United States Senate
Mr. Paul W. Arvidson (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
WJ

LEASABLE MINERALS * 5 Sodium

An application for a sodium prospecting permit was properly rejected as to lands which the Geological Survey reported were not prospectively valuable for sodium compounds.

Lands granted to a railroad under the Act of March 3, 1875, as a right-of-way for station grounds are grants of easements only; mineral deposits underlying the right-of-way are not included in these grants and the lands are not precluded thereby from inclusion in a sodium prospecting permit.

Merilyn Wessendorf, Los Angeles 0146936
(May 12, 1959)

In reply refer to:
Los Angeles 0146936
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 12, 1959

Certified Mail
Return Receipt Requested

DECISION

Merilyn L. Wessendorf : Sodium Prospecting Permit Application

Decision Affirmed in Part and Reversed in Part

Merilyn L. Wessendorf appealed from the Acting Manager's decision dated April 24, 1958, to the extent her sodium prospecting permit application was rejected as to land in sec. 14, T. 29 S., R. 39 E., M.D.M., embraced in a right-of-way for station grounds, granted to the Nevada and California Railroad, 1/ and as to land in sec. 22, T. 29 S., R. 39 E., embraced in desert land entry Los Angeles 096311 and as to which the United States Geological Survey reported the land to be not prospectively valuable for sodium.

The appellant states the land in sec. 22 is valuable for sodium prospecting as it is located in an area near Koehn Lake which is one of the most likely places in which to find sodium borates. She states further that the station grounds right-of-way is not being used for that purpose, however, that prospecting for sodium and underground mining of it would not interfere with use of the right-of-way for the purpose for which it was granted.

In a supplemental report of September 3, 1958, the Geological Survey has stated that wells drilled in the vicinity of the lands in sec. 22, involved in the appeal, do not indicate any likelihood that the underlying sediments contain deposits of ulexite or other sodium compounds, and the data submitted and published information on the area do not warrant a change in their previous determination that the lands are considered not prospectively valuable for sodium.

The Director of the Geological Survey is the official expert, expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." (43 U.S.C., sec. 31, Carl Nyman, 59 I.D. 238). The department has held that the Geological Survey's determination in such respect will not be disturbed in the absence of a clear showing that the determination was improperly made. Cf. Duncan Miller, A-27644 (September 22, 1958). No such showing has been made in this appeal. The decision of the land office was correct, as to these lands, and it is affirmed.

1/ Under the Act of March 3, 1875 (43 U.S.C., secs. 934-939).

As to those lands embraced in the station grounds right-of-way, the United States Supreme Court held in the case of Great Northern Railroad Co. v. United States, 315 U.S. 262, that the Act of March 3, 1875, supra, providing for the grant of rights-of-way through the public lands to railroads clearly granted only an easement and not a fee, and conferred no right to the mineral deposits underlying the rights-of-way. In view thereof, the right-of-way for station grounds here involved does not preclude the issuance of a sodium prospecting permit on the same lands. The decision of the Acting Manager is reversed to this extent.

When this decision becomes final the case will be remanded to the Land Office through the Assistant to the State Supervisor, Los Angeles, California, for further consideration of the sodium prospecting permit application, consistent with this decision.

Merilyn L. Wessendorf is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Merilyn L. Wessendorf (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
WJ

54561

LO(Sec)

MINING CLAIMS * 6 Lands Subject to

Lands within power site withdrawals were not open to the location of mining claims until the adoption of the act of August 11, 1955, and any attempted location before that time subsequent to the withdrawal of the land for power site purposes is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

E. L. McDonald, (Sacramento), S-7129
(May 21, 1959)

LD

In reply refer to:
(Sacramento), S-7129
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 21, 1959

Certified Mail
Return Receipt Requested

DECISION

	:	
	:	Grubstake Placer Mining Claim
E. L. McDonald	:	covering the $S\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$ sec. 22,
	:	T. 32 N., R. 6 W., M.D.M.,
	:	California
	:	

Decision Affirmed

Mr. McDonald has appealed from a decision of the Manager, Land Office, Sacramento, California, dated July 11, 1958, declaring the Grubstake Placer mining claim null and void. The claim was declared invalid because it was located on March 15, 1935 at a time when the land therein embraced was withdrawn from location under the mining laws by reason of its inclusion in Power Project No. 247 of March 2, 1923. The land had not been restored to entry under section 24 of the Federal Power Act.

The appellant contends that metalliferous mineral explorations on lands withdrawn for power development are authorized by the act of June 25, 1910 (43 U.S.C., secs. 141-143), and that if Section 24 of the Federal Power Act of June 10, 1920 (16 U.S.C. sec. 818) does not repeal the provisions of the 1910 act, his mining location is valid. He asserts that at the time of location of his claim he was informed by the County Recorder that the claim would be subject to the condition that when and if the reservoir is constructed he would be reimbursed for all expenditure involved in developing the claim; that he has expended $1,800 in various construction in the course of exploring the claim; and that he is entitled to reimbursement in the sum of $1,800.

Section 1 of the act of June 25, 1910 provides that the President may temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States and reserve them for water-power sites, irrigation, etc., and that such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress. Section 2 of the 1910 act* states that all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals.

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*As amended by the act of August 12, 1912 (37 Stat. 497).

Section 24 of the act of June 10, 1920 provided that any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress.

The records disclose that the land covered by the appellant's mining claim was withdrawn from location and entry by Power Project No. 247 of March 2, 1923, pursuant to Section 24 of the Federal Power Act of June 10, 1920, _supra_. Under this section providing that public lands included in power projects shall be reserved from location, the filing of an application for a power site automatically withdraws the affected land from mineral location. _Minner_ v. _Sadler_, 139 P.2d 356 (1943).

Until the passage of the act of August 11, 1955 (30 U.S.C., 1952 ed., Supp. V, secs. 621-625), the fact that the land in question was reserved for a power project prevented the location of a valid mining claim on it, if the land embraced in the claim had not been restored to entry under Section 24 of the Federal Power Act, _supra_. _Harry A. Schultz et al._, 65 I.D. 145 (1958). Since the land in question had not been restored to entry, the appellant's location made in 1935 was invalid from its inception.

Erroneous information which may have been furnished to the appellant as to whether the land was open to metalliferous mining location cannot operate to vest in the appellant a right not authorized by law.

The decision of the Manager is accordingly affirmed.

Mr. McDonald is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Earl J Thomas

Acting Director

Enclosure

DISTRIBUTION:

Mr. E. L. McDonald (Certified Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

54561

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 5 Government Contests

A mining claim is properly declared null and void where the complaint charged that no discovery had been made within the limits of the claim and the contestee failed to answer and deny the charge.

United States v. Lloyd S. Loveridge et al., Sacramento Contest 10-551 (May 21, 1959)

LO

In reply refer to:

Contest No. 10-551
(Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 21, 1959

Certified Mail
Return Receipt Requested

DECISION

United States,
Contestant
v.
Lloyd S. Loveridge et al.,
Contestees

Mining Claim

Decision Affirmed

Contest proceedings were initiated on April 1, 1958, against Lloyd S. Loveridge, certain other individuals, the heirs and devisees of two deceased individuals, and unknown persons believed to be the owners, or assert ownership, of a placer mining claim situated in Sec. 31, T. 35 N., R. 8 W., M.D.M., California. The complaint in the contest proceedings charged that the claim is nonmineral in character, and that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.

Notice of the complaint was served by registered mail on most of the persons named therein. Service by publication was had on all other persons who may have an interest in the claim. The only response to the notice of the complaint was a letter dated April 7, 1958, from Lloyd S. Loveridge who stated that "* * * my Brother A. G. Loveridge and myself will not contest this action * * *."

By decision of December 19, 1958, the Manager of the Sacramento, California, Land Office, declared the claim null and void on the basis that the failure of the contestees to file a denial of the charges within the time allowed by the Department's rules of practice constituted an admission of the truth of the charges in the complaint. Mr. Loveridge has appealed to this office from the Manager's decision.

In his appeal Mr. Loveridge indicates his belief that he has some "vested rights or interest in the matter" and is entitled to compensation from the Government from the taking of those rights.

Regulation 43 CFR 221.64 provides, in material part, that within 30 days after service of the complaint or after the last publication of the notice, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint. Regulation 43 CFR 221.65 provides that if an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing.

It is clear that Mr. Loveridge's letter of April 7, 1958, was not a specific answer to the complaint. Therefore, the failure to specifically deny the charges must be taken as a confession of the truth of the charges in the complaint.

The appeal does not allege any error in the Manager's decision and fails to set forth any reason warranting a reversal of the decision. Nor was any showing made indicating that the result of a hearing would alter or change the decision appealed from if the appellant were permitted to interpose an answer.

No error appearing in the record, the decision of the Manager is hereby affirmed.

Mr. Loveridge is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal, the adverse party to be served is:

Regional Solicitor
Department of the Interior
Sacramento 21, California

Carl J. Thomas
Acting Director

Enclosure

DISTRIBUTION:
Mr. Lloyd S. Loveridge (Certified Mail)
Regional Solicitor (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
BF

LO(Sac)

MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under Public Law 167 is the maximum time allowable for such purpose, and it may not be extended by the Department (65 I.D. 481). John O. Cleveland, Sacramento (PL 46-80) (June 1, 1959)

LO

In reply refer to:
Sacramento (PL 46-80)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 1, 1959

Certified Mail
Return Receipt Requested

DECISION

John O. Cleveland : Golden Era Mining Claim, situated in Sec. 33, T. 3 N., R. 15 E., M.D.M., California

Decision of Manager Affirmed

Mr. Cleveland has appealed from a decision of the Manager, dated February 27, 1959, rejecting his verified statement, filed January 27, 1959, under section 5 of the act of July 23, 1955 (30 U.S.C. sec. 613(a)). The statement was rejected for the reason that it was not timely filed, that is, within 150 days from July 2, 1958, the date of first publication of notice that the filing of such a statement was required. The verified statement was filed some 209 days after the date of the first publication.

The appellant concedes that the verified statement was not timely filed. He asserts that illness prevented his timely filing of the verified statement and in effect requests that the 150-day filing requirement be waived.

The Department has held that the 150-day statutory period in which to file under the act of July 23, 1955 is the maximum time allowable for such purpose, that such period may not be extended by the Department and that a verified statement required under the act is properly rejected and the use of surface resources denied to the mining claimant where the required statement is not timely filed. Hines Gilbert Gold Mines Company, 65 I.D. 481 (1958). It follows that since the required statement was not timely filed, the decision rejecting the verified statement was proper.

Accordingly, the decision of the Manager is affirmed.

Mr. John O. Cleveland is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. John O. Cleveland (Certified Mail)
Mr. John Sieker, Forest Service, U. S. Department of Agriculture (8)
Regional Forester, Building 85, Federal Center, Denver, Colorado
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
FF

56242

appeal to Sec LO(Sec)
affirmed A-28182
4-14-60

MINING CLAIMS	* 1	Generally (Act of August 11, 1955)
	* 3	Contests
RULES OF PRACTICE	* 1	Generally
	* 5	Government Contests

Where a contestee answers a complaint but does not specifically meet and respond to the allegation that mining claims are invalid for want of discovery, the allegations of the complaint must be taken as confessed and the claims declared null and void.

A mining claim is ineffective against the government until perfected by a valid discovery. Where discovery is made subsequent to August 11, 1955, a claim situated within a power site and although located prior to the withdrawal of the lands for power-site purposes, is subject to the terms and provisions of the act of August 11, 1955.

United States v. M. V. Browning et al., Contest Nos. 10-16 etc. (Sacramento) (June 1, 1959)

Contest Nos. 10-16
10-274A
10-276
10-277
10-278
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION June 1, 1959

United States :
:
v. :
:
M. V. Browning, Administrator : Mining Claims
of the Estate of O. W. Browning, :
deceased :
:
Edna A. Browning, et al. :

Decisions Affirmed as Modified

Contest proceedings were commenced with service of complaints in the cases identified above. Although answers to the complaints, in each case, were filed within the 30-day period prescribed by the rules of practice, the matters were not set for a hearing. Instead the Manager, Land Office, Sacramento, California, rendered decisions, dated June 2 and 17, 1958, declaring null and void the twelve claims involved in this appeal. The claims were declared invalid for the reason that the mining claimants had not complied with the recording provisions of the act of August 11, 1955 (30 U.S.C., 1952 ed., Supp V, secs. 621-625). Mr. Browing, representative of the estate of O. W. Browning, has appealed from those decisions.

The appellant, on appeal, stated in material part:

> " (3) That he personally made a visit to the site of said claims and in fact was attempting 'a valid discovery' within the meaning of the exception in the act of August 11, 1955 *** "
>
> " (4) That the contestee, M. V. Browning, Administrator, being thoroughly unfamiliar and equally uninformed, relied upon the U. S. Department of the Interior, Bureau of Land Management, Land Office, Sacramento, California, and their actions in informing him that these claims would be set for an early hearing misled the said contestee and prevented his taking more positive action toward 'a valid discovery';".

Paragraph V of each complaint charged, in pertinent part, that "Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery." Paragraph 5 of the answer filed in each case contained the identical statement 1/ that "Having no knowledge of the allegations in paragraph 5 of the complaint, contestee neither admits nor denies but demands proof thereof."

The rules of practice, 43 CFR 221.64, provides in pertinent part as follows:

> "Within 30 days after service of the complaint *** the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint ***."

The answers did not specifically meet and respond to the allegations in the complaints that no discovery had been made within the limits of the claims. In this connection regulation 43 CFR 221.65 provides that:

> "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing."

It follows that, aside from the reasons assigned by the Manager, since the allegations of the complaints were not denied, that they should have been taken as confessed and the claims declared null and void for that reason.

Paragraphs 3 and 4 of the appeal clearly show that the appellant could not establish a discovery on any of the mining claims involved when the contest proceedings were commenced and that it was only after the initiation of these proceedings (subsequent to August 11, 1955) that he "was attempting a valid discovery." It follows, even if discovery were established due to the appellant's efforts after the rendition of the Manager's decisions, that the effective dates of locations would be only from the dates of discovery, which in each event would be subsequent to the dates of the decisions appealed from. However, a location becomes effective only from the date of discovery and prior to the effective date thereof there would be no location insofar as the Government is concerned; a claim, unless and until perfected by discovery, is null and void. See Cole v. Ralph, 252 U.S. 286 (1920). It is proper to note, in the instant case, that even if discovery should be shown at the present time that the claims would be subject to the terms and provisions of the act of August 11, 1955.

Accordingly, the decisions appealed from are affirmed as modified above.

1/ The answers in contests 10-274A, 10-276, 10-277 and 10-278 referred to paragraph 3 of the complaint. This appears to be a typographical error in each instance.

Mr. Browning is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

William C. Morrell, Attorney at Law (Certified Mail)
Mr. M. V. Browning (Regular Mail)
Edna Mae Browning (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
BF

56242

LOSac

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 5 Government Contests

Where a complaint in a contest proceeding charged lack of discovery and the contestee failed to answer within 30 days after service the Manager did properly consider the charge as admitted and render decision declaring the mining claim null and void.

United States v. Herbert S. Blakemore et al., Contest 10-89 (Sacramento) (June 1, 1959)

L0

In reply refer to:
Contest 10-89 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

June 1, 1959

United States
v.
Herbert S. Blakemore et al.

Boulders Placer Mining Claim
situated in the $N\frac{1}{2}S\frac{1}{2}$ sec. 14,
T. 34 N., R. 8 W., M.D.M., California

Decision Affirmed

The complaint in contest proceeding, No. 10-89, charged that minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. No answer having been received within the 30 days (as required by 43 CFR 221.64), the Manager, by decision of December 31, 1958, declared the claim invalid. He stated "The failure of contestee to file denial of the charges within the time allowed by the rules of practice is considered an admission of the truth of the charges and the claim is hereby declared null and void." Mr. Blakemore has appealed from that decision.

The appellant asserts that the Boulders mining claim was validly located and held and that annual assessment work has been performed.

The rules of practice, 43 CFR 221.65(a) provides that:

> "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing."

A covering letter, accompanying the complaint, advised the appellant that an answer must be filed within 30 days and if an answer was not received within the prescribed time that the allegations of the complaint would be taken as admitted by the contestee.

In accordance with the prescribed regulation, the Manager did take the charge concerning lack of discovery as confessed and did render decision accordingly. No error is alleged in the decision appealed from nor is any showing made that would indicate that the result of a hearing, even if allowed, would alter or change the decision appealed from.

Therefore, the Manager's decision is affirmed.

Mr. Blakemore is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 4291
Sacramento 21, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Herbert S. Blakemore (Certified Mail)
Regional Solicitor, Department of the Interior (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

56242

LO(Sac)

MINING CLAIMS * 6 Lands Subject to Location

Prior to the passage of the act of August 11, 1955 (30 U.S.C. sec. 621-625), lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

United States v. Donald A. Matheson, Jr., Contest 10-9-(Sacramento)
(June 9, 1959)

In reply refer to:

Contest 10-9 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 9, 1959

Certified Mail
Return Receipt Requested

DECISION

United States	:	Beaver Quartz Mining Claim
v.	:	Situated in Sec. 32, T. 35 N.,
Donald A. Matheson, Jr.	:	R. 8 W., M.D.M., California
	:	

Decision Affirmed

Mr. Matheson has appealed from a decision of the Manager, Land Office, Sacramento, California, dated July 17, 1958, declaring the Beaver Quartz mining claim invalid. The claim was declared null and void because it was located at a time when the land involved was withdrawn from location under the mining laws and had not been restored to entry at time of location.

The records show that the land covered by the appellant's location was reserved from entry, location, or other disposal under section 24 of the Federal Power Act (16 U.S.C., 1952 ed., sec. 818) on September 1, 1922, and included in Power Project No. 247.*

In his appeal the appellant stated:

> " * * *This claim was continously located before year
> 1922 and also held by transfers from party to party.
> I purchased this claim from a Mr. T. E. Lewis. * * *"

A copy of the appellant's location notice shows that the claim was located by him on July 2, 1941, and was recorded in the office of the County Recorder of Trinity County, California on July 28, 1941. The appellant submitted no evidence to show that the recorded location notice was not an original location. We must consider the appellant's recorded notice in the county records as his original location notice.

---

* The appellant's statement that "part of his claim was not included in the Sampson Power Site" is not borne out by the records. Platting of the claim on Geological Survey maps shows the discovery point to be on withdrawn or patented land. None of the land within the claim appears to fall on public land other than which is withdrawn for power site purposes.

Prior to the passage of the act of August 11, 1955 (30 U.S.C., 1952 ed., Supp V secs. 621-625), lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location. _Day Mines, Inc._, 65 I.D. 145 (1958). It follows that the Beaver Quartz mining claim was invalid when located and that maintenance of the claim under the original location may not serve to validate that original location.

Accordingly, the Manager's decision, declaring the claim null and void, is affirmed.

Mr. Matheson is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Donald A. Matheson, Jr., (Certified Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

56242

appeal to Sec
affirmed A-28182 (Of Sac)
4-13-60

67 I.D.

9-16

MINING CLAIMS * 6 Lands Subject to

Lands covered by lease under the Recreation Act, 43 U.S.C. sec. 869, are not subject to location because the Secretary has not promulgated rules and regulations for the prospecting and mining of such lands.

Where mining claimants sought to record location notices pursuant to the act of August 11, 1955, and where the lands embraced within the locations were under recreation lease HELD: it was proper to refuse to accept the notices for filing.

Carl F. Murray et al., ML 159, Sacramento 29.1
' June 16,1959)

LO

In reply refer to:

ML 159, Sacramento 29.1
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 16, 1959

Certified Mail
Return Receipt Requested

DECISION

Carl F. Murray and
Clinton D. Coker

Big Shot, Big Shot Extension,
Big Shot Annex and D & D Lode
Mining Claims, situated in NE$\frac{1}{4}$NW$\frac{1}{4}$
and N$\frac{1}{2}$NE$\frac{1}{4}$ sec. 24, T. 13 N., R. 9 E.,
M.D.M., California

Decision Affirmed

Messrs. Murray and Coker have appealed from a decision of November 8, 1958, which held that copies of notices of location, offered for filing in purported compliance with the act of August 11, 1955 (30 U.S.C. secs. 621-625) were unacceptable. The Manager, in effect, held the mining claims involved to be invalid because they embrace lands which, when located, were not subject to appropriation under the mining laws.

The above-identified lands were among lands withdrawn for first form reclamation purposes and for power site purposes. They were restored on March 12, 1958;* the order of restoration did not provide for leasing for recreation or public purposes. The claimants located their mining claims on August 18, 1958, and thereafter attempted to record copies of the notices of location as provided by the act of August 11, 1955. The filings were refused because the lands, among others, were leased to the Western States Trail Ride, Inc., for recreation and public purposes under 43 U.S.C. 869, 869-1 (43 CFR Part 254). The lease was issued effective May 29, 1958, pursuant to application filed on February 11, 1958. A notation of the classification of the lands for recreational and public purposes had been placed in the tract books on May 27, 1958.

The appellants contend that the Order of Restoration did not provide for leasing for recreational purposes and that a lease issued for reason other than enumerated in that order is a nullity. They assert that their claims are properly located on lands subject to mineral location.

---

* 23 F.R. 1705 (March 12, 1958), but restored to mining effective July 11, 1958.

43 U.S.C. sec. 869(a) provides in pertinent part that:

> "The Secretary of the Interior upon application filed by a duly qualified applicant * * * may * * * dispose of any public lands to a * * * nonprofit corporation or nonprofit association for any public purpose consistent with its articles of incorporation or other creating authority. * * *"

Section 869-1 provides in pertinent part that:

> "The Secretary of the Interior may after due consideration as to the power value of the land, whether or not withdrawn therefor, * * * (d) lease such land to a nonprofit corporation or nonprofit association at a reasonable annual rental * * *. Each patent or lease so issued shall contain a reservation to the United States of all mineral deposits in the lands conveyed or leased and of the right to mine and remove the same, under applicable laws and regulations to be established by the Secretary. * * *

The statute clearly authorizes the Secretary to lease public lands, whether withdrawn or not, for recreation and public purposes; his authority to so dispose of the lands is established by statute and was not in any way qualified or curtailed by the order of restoration. The lease to the Western States Trail Ride, Inc., was in all respects regular and proper and the lands included in that lease are not presently subject to mineral appropriation except under such rules and regulations as may be promulgated and established by the Secretary. As the Secretary has not to date prescribed regulations permitting the prospecting or mining of lands covered by recreational leases, the lands subject of this appeal, are not subject to location under the mining laws. Cf. The Dredge Corporation, 64 I.D. 368 (1957). It follows that the appellants' mining claims are invalid, and that copies of location of the void claims were properly refused for filing.

Accordingly, the decision appealed from is affirmed.

Messrs. Murray and Coker are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal, the adverse party to be served is:

Western States Trail Ride, Inc.
Post Office Box 1228
Auburn, California

Carl J Thomas
Acting Director

Enclosure

DISTRIBUTION:

Gilmore & Gilmore (Certified Mail)
Mr. Carl F. Murray (Regular Mail)
Mr. Clinton D. Coker (Regular Mail)
Western States Trail Ride, Inc. (Regular Mail)
Minerals Staff Officer (5)
Lands Staff Officer (1)
Geological Survey (3)
Appeals List No. 1
BF

L (Sac) 15.1
9-16

LEASABLE MINERALS * 1 Generally
(Other than Oil and Gas)

It is proper to reject an application for a mineral prospecting permit for copper, zinc, lead and associated gold and silver where the lands applied for are acquired lands being administered by the Bureau of Reclamation and that agency objects to issuance of a permit for prospecting or mining of any kind or nature.

Mountain Copper Company, Sacramento 053729
(June 16, 1959)

In reply refer to:
Sacramento 053729
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 16, 1959

Certified Mail
Return Receipt Requested

DECISION

Mountain Copper Company : Copper, Zinc, Lead and associated
: Gold and Silver

Decision Affirmed as Modified

The Mountain Copper Company has appealed from a decision of the Manager, dated December 2, 1958, rejecting its application for a prospecting permit on 245 acres of land pursuant to the Department's regulations 43 CFR 200.31 et seq., for the reason that the Bureau of Reclamation, the agency having jurisdiction of the land, has withheld consent to prospecting or mining of any kind on 164.75 acres of the lands applied for which was reacquired by the United States under the Reclamation Act of September 1, 1949 (30 U.S.C., 192(c)), and the company was not interested in a permit solely on the other lands. [1]

The appellant contends the 164.15 acre tract comprises one of the most favorable for prospecting in the area and that this property is in no way involved or needed by the Shasta Reclamation Project.

Even though 164.15 acres of the lands involved in this appeal may be subject to mineral prospecting under ordinary circumstances, such prospecting is discretionary with the Department. Cf. United States ex. rel. Jordan v. Ickes, 143 F. 2d 248 (App. D. C. 1944), certiorari denied, 323 U.S. 759. The Secretary of the Interior has provided that "Prospecting may be carried on with the consent of the appropriate official of the Department, bureau or agency having jurisdiction over the land * * *" (43 CFR 200.35(c). That regulation is in consonance with the departmental rulings that where the issuance of a permit or lease would be incompatible with the primary purpose for which the lands were withdrawn or being used by an agency of the Government, it is proper to reject applications for such permits or leases. See in this connection, Earl J. Boehme et al., 62 I.D. 9 (1955).

---

[1] Although the Reclamation Bureau and the Forest Service have granted their consent, with certain stipulations, according to the record the other lands applied for are public domain and the applications also are subject to rejection as to these lands since they are not properly included in an acquired lands application.

In a letter dated June 13, 1958, the Acting Regional Director reported:

> "The Bureau of Reclamation has determined that prospecting or mining of any kind or nature on these fee acquired lands comprising 164.75 acres, will not be permitted."

Since the Bureau having jurisdiction of the lands has stated that mining operations of the type contemplated by the appellants would interfere with the use for which the land was acquired and has objected to the issuance of a permit, the application was properly rejected. Accordingly, the Manager's decision is affirmed.

The Mountain Copper Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Earl J. Thomas

Acting Director

Enclosure

DISTRIBUTION:

The Mountain Copper Company (Certified Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Appeals List No. 1
EG

appeal to Sec
affirmed A-2823 BO(Sac)
5-10-60

MINING CLAIMS * 5 Discovery

To constitute a valid discovery upon a mining claim there must be a discovery of such a valuable deposit of mineral within the limits of the claim as would warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Loss of discovery on a mining claim serves to invalidate the claim.

United States v. Jay R. Fogal, Contest 5078 (Sacramento)
(June 16, 1959)

20

In reply refer to:
Contest No. 5078 (Sacramento)
Sacramento 038357 (Mineral Patent Application)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 16, 1959

Certified Mail
Return Receipt Requested

DECISION

United States	:	Alma, Cub Bear, Hill Top, Lane,
	:	Madrone, Rebecca, Rebecca Extension,
v.	:	and Wild Pidgeon placer mining claims
	:	situated in NE$\frac{1}{4}$ sec. 15, T. 12 N.,
Jay R. Fogal	:	R. 10 E., M.D.M., California

Decision Affirmed

A contest proceeding against the above-identified mining claims of Jay R. Fogal was initiated after the filing of a mineral patent application. In material part, the complaint charged that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. After a hearing, duly conducted, the Hearing Examiner, by decision of April 28, 1958, held that all the claims were invalid for want of discovery.

The contestee's appeal is a reiteration of his evidence and arguments advanced at the hearing. He alleges that the decision appealed from is contrary to the weight of evidence.

The testimony of the several witnesses is accurately summarized in the decision below. The Government's mineral examiner, who took more than 60 samples during examinations of the claims, testified that he found no evidence of significant mineralization which would justify a prudent man in expending labor and means in an effort to develop a paying mine.

The contestee offered testimony to the effect that the subject claims were previously successfully operated for the gold therein contained and that it is only because of the increase in price of labor and the depressed price of gold that they cannot now be successfully exploited. He stated that although the claims were located as placers that his "intent was and still is to develop these claims with the hope of discovering a lode or enrichened body of or that -- or in place ***." (TR 125). On cross-examination Mr. Fogal stated that the claims have no present actual value for mining operations. (TR 205). He testified and introduced evidence to establish the mineral character of the land and showed that he had recovered some small quantities of gold from within the limits of the claims.

From the testimony adduced it appears to be the contestee's theory that present showings of colors of gold on lands which may have been previously valuable for minerals are sufficient to establish a discovery under the mining laws.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. 30 U.S.C. 1952 ed., sec. 22 and sec. 23; Waskey v. Hammer, 223 U.S. 85 (1912); United States v. Wilmot D. Everett et al., A-27010 (October 17, 1955); United States v. Josephine Lode Mining and Development Company, A-27090 (May 11, 1955). The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. M. W. Mouat et al., 61 I.D. 289 (1954).

It is clear that "discovery" upon which a claimant relies must be of a particular deposit, actually discovered, which warrants further expenditure of time and money in its development. Oregon Basin Oil and Gas Co., 50 L.D. 253 (1923). The discovery, to satisfy the requirements of the law, means more than the showing only of isolated bits of mineral not connected with or leading to substantial value, nor may geological inference or belief as to the existence of minerals be substituted for an actual discovery. United States v. Frank J. Miller, 50 I.D. 446 (1947). Even if there was a previous valid discovery of a valuable mineral (gold) within the limits of the claims, and even if the commercial recovery thereof was an economic success, that original discovery and operation (terminating prior to the time the claimant acquired the subject mining properties) will not serve to validate the claim at present if that discovery has been lost for any reason whatsoever. Waskey v. Hammer, supra., Gwillam v. Donnellan, 115, U.S. 45 (1885). In order to sustain a location it is not sufficient to show the claims may have been formerly valuable for minerals, but it must be shown as a present fact that the land is mineral in character and is valuable for its mineral content and a discovery of valuable deposits has been made within the limits of the claim. United States v. Margherita Logomarcini, 60 I.D. 371 (1949).

It is true that the finding of colors or traces of gold may in itself warrant further prospecting, but the mere finding of gold traces in gravels and areas that may once have been valuable for gold does not of itself constitute a valuable discovery. Steele v. Tanana Mines R. Co., 148 Fed. 678 (1906) United States v. Margherita Logomarcini (supra). The contestee's mere expressions of hopes and beliefs that he expects to discover a lode or enriched body of ore cannot be accepted as equivalent to discovery. Castle v. Womble, 19 L.D. 455 (1894).

The contestant clearly established that the bits of mineral recoverable from the claims are not connected with and do not lead to deposits of substantial value and that a person of ordinary prudence would not be justified in the further expenditure of labor and means, with the reasonable prospect of success, in developing a valuable mine. In such case a valuable discovery within the limits of any of the claims has not been demonstrated. The claims, therefore, are null and void.

The decision appealed from is, accordingly, affirmed.

Mr. Fogal is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 4291
Sacramento 21, California

Earl J Thomas
Acting Director

Enclosure

DISTRIBUTION:

Mr. Jay R. Fogal (Certified Mail)
Gilmore & Gilmore, Attorneys at Law (Certified Mail)
Regional Solicitor, Department of the Interior (Regular Mail)
Mr. John Sieker, Forest Service, U.S.D.A. (Regular Mail)
Hearings Administrative Officer
Minerals Staff Officer (5)
Appeals List No. 1
BF

LO(Sac)

MINING CLAIMS * 1 Generally, P. L. 167, Sec. 5
* 4 Determination of Validity
* 5 Discovery
* 7 Location
RULES OF PRACTICE * 6 Hearings
* 1 Generally

Where in an in rem procedure under Public Law 167, notice of hearing is served on the mineral claimant by a Hearing Examiner and the hearing is conducted in the manner prescribed for contest cases, including the allowance of the right of appeal, there is compliance with the provisions of the act of July 23, 1955.

Under the in rem procedure as provided in section 5 of the act of July 23, 1955, the claimant of an unpatented mining claim must be shown to be the owner of a valid and subsisting location perfected by a discovery prior to the enactment of the law in order to be entitled to exclusive possession against the United States; if not, the mining claim, prior to issuance of patent is subject to the limitations and restrictions in section 4 of the act.

The United States, and Coughlan Brothers (a partnership-mineral claimants), PL 23-16 (Sacramento)
(June 18,1959)

LO

In reply refer to:

PL 23-16 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 18, 1959

Certified Mail
Return Receipt Requested

DECISION

The United States, and
Coughlan Brothers (a partnership-mineral Claimants)

In the Matter of Determination of Surface Rights on Certain Unpatented Lands of the United States under Section 5 of the Act of July 23, 1955 (69 Stat. 367; 30 U.S.C. sec. 613); referred to as Public Law 167, 84th Congress.

Lucky Strike and Lone Star Mining Claims situated in Sec. 7, T. 17 N., R. 9 E., M.D.M., California

Decision Affirmed

Coughlan Brothers have appealed from a decision of the Hearing Examiner, dated September 26, 1958, insofar as it declared the Lucky Strike and Lone Star mining claims subject to the provisions of section 4 of the Multiple Use Act of July 23, 1955.

A notice to mining claimants under section 5 of the act was published upon the request of the Bureau of Land Management; the area described in such notice included the lands embraced in the Lucky Strike and Lone Star mining claims. After the verified statement required by the act was filed the Hearing Examiner notified the mining claimants, appellants herein, that the Government, at the hearing to be conducted, would offer evidence to prove (1) that a discovery of valuable mineral has not been made within the limits of the unpatented claims and (2) that the lands included within the claims are subject to use and management by the United States in accordance with the provisions of section 4 of the act.

The Examiner, after consideration of the testimony and evidence offered at the hearing found that "There is no testimony by the claimants or their witnesses that a discovery of valuable minerals has been found within the limits of the claim in sufficient quantity as would justify the issuance of patent under the mining laws of the United States. Accordingly, I must conclude that the Government has sustained its charges." He "further determined that the lands included within the limits of the Lone Star and Lucky Strike placer mining claims prior to the issuance of patent therefore are subject to use and management by the United States in accordance with section 4 of the act of July 23, 1955."

On appeal the appellants assert:

> "1. That the law under which these proceedings were initiated contemplated the taking of property for public use without compensation and violates the Federal Constitution.
>
> "2. That the rule announced in the decision that the claimants must show mineral values within the limits of the claim in sufficient quantity as would justify the issuance of patent is an erroneous concept of what constitutes a discovery and is not the proper measure by which to determine the existence of a discovery particularly in this proceeding.
>
> "3. That the conduct of the hearing and the proceedings leading thereto were not in accordance with the rules and regulations prescribed by the department for contest and and (sic) protest."

If there be merit to appellants' first and third contentions, then, even without reference to the testimony or evidence adduced at the hearing, the decision appealed from must be vacated. We will, therefore, first discuss those contentions.

The inherent authority of Congress to legislate concerning the disposal of the public lands is not questioned. However, the appellants assert that the Multiple Use Act contemplates the taking of property without compensation.

Even as equitable rights in a locator were recognized after perfection of a claim and even before patenting thereof the law recognized that the possessory title of the owner of an unpatented mining claim was limited to the right to mine and remove the "valuable" minerals and to use the surface and any materials on or in the claim only to the extent reasonably required in connection with his mining operations. United States v. Rizzinelli, 182 Fed. 675; Teller v. United States, 113 Fed. 273; United States v. Etcheverry, 230 F. 2d 195. In this vein the Supreme Court has clearly enunciated that a location becomes effective only from the date of discovery. Cole v. Ralph, 252 U.S. 286 (1920). In Wilbur v. Krushnic, 280 U.S. 306 (1930), it said that "when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; * * * The owner is not required to to purchase the claim or secure patent from the United States * * *." It follows, if there is no discovery to perfect the location there is no exclusive right to possession and no property right in the owner of the claim.

The Multiple Use Act provides an in rem procedure in the nature of a quiet title action whereby it can be determined whether a mining location made prior to July 23, 1955, has been perfected by a valid discovery of valuable mineral prior to that date and resolve the rights to surface use and management until patent issues without resort to contest proceedings. Where after a hearing it is determined that the mining location had been perfected by a discovery then the owner of the claim is entitled to exclusive possession and the restrictions and limitations of section 4 of the act would not apply. On the other hand, where the mining location is not perfected by a valid discovery there is no right to exclusive possession as against the Government and the location will be subject to the provisions of section 4 of the act until patent is issued. In the latter event, there is no taking of property as no property right has been established in the mining claimant. Moreover, the claimant still has the right to explore for minerals and to use so much of the surface of the claim and its resources as is necessary and incident to mining use.

After a verified statement was filed the Hearing Examiner notified the mineral claimants of a hearing to be conducted and of the charges (matters asserted) against the claims. The procedures in regard to the scheduling of the hearing, and the conduct thereof, followed the general procedures and rules of practice of the Department in regard to contests or protests as required by Public Law 167. It was the Bureau of Land Management through its State Supervisor at Sacramento that made the assertions contained in the notice of hearing and proceedings were prosecuted by the Bureau. The appellants appeared in this proceeding in order to assert their right to exclusive possession of the mining claims. Although the Government initiated the proceedings and had the initial burden of sustaining the first assertion - that there had been no discovery - if it were to prevail in the proceeding, once the Government had produced evidence to show that no discovery had been made, it was up to the claimants to overcome that evidence. United States v. Everett Foster et al., 65 I.D. 1, 11 (1958).

In accordance with statutory and regulatory requirements, a hearing was duly conducted. The testimony and evidence adduced is accurately summarized in the decision below. Except for a difference of opinion in the location of the southern extremities of the present day ancient channel gravels, the parties were in substantial agreement concerning the evidence presented. From the testimony presented the Government established that the quantity of gold in the lands is so insufficient that a reasonably prudent man would not be justified in further expending labor and means, with a reasonable prospect of success, in developing a valuable mine. The mineral claimants did not refute this testimony; their witnesses concluded that the showings warrant further investigation and exploration and that a prudent man would be justified in expending further monies for these purposes.

A valid location of a mining claim can be made only if a valuable mineral deposit has been discovered within the limits of the claim. 30 U.S.C. sec. 22; Waskey v. Hammer, 223 U.S. 85 (1912); United States v. Wilmot D. Everett et al., A-27010 (October 17, 1955). The requirements of the statute concerning discovery are met where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. United States v. M. W. Mouat et al., 61 I.D. 289 (1954) and cases cited.

The prudent man rule enunciated in Castle v. Womble, 19 L. D. 455 (1894) and Cameron v. United States, 252 U.S. 450 (1920) is the test determinative whether discovery has been made under the mining laws. The criteria for determining validity of discovery is the same in all cases where rights of a mineral claimant are asserted against the Government; the same rule is applicable in patent proceedings. See United States v. Josephine Lode and Development Company, A-27090 (May 11, 1955).

Even as in contest procedures it was incumbent upon the Government to establish lack of discovery in order to establish its superior title to the claims. Further, there is a presumption of the validity of a mining location; this presumption is rebuttable; it must be proved by evidence other than recitals in the location notices. Recognizing this presumption the Government proceeded to introduce evidence to overcome it; once having introduced such evidence it was incumbent upon the appellants to overcome the testimony showing invalidity of the claims.

The criteria to establish validity of a mining claim is set forth above. Applying that criteria to the facts in this case (the facts are accurately summarized in the decision below) we find that the determination of the hearings officer concerning the location of the ancient channel gravels is fully supported by the evidence presented. While further exploration or prospecting may be warranted, we find that the preponderance of the evidence establishes that minerals have not been found within the limits of the claims in such quantity or value that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine. It follows that a discovery within the meaning of the mining laws has not been made. Since the locations, then, are ineffective against the Government, the Hearing Examiner properly held that prior to issuance of patent they are subject to the limitations and restrictions in section 4 of the act.

Accordingly, the decision appealed from is affirmed.

The Coughlan Brothers are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
4th and J Streets
Sacramento, California

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:

Mr. Frank G. Finnegan, Attorney at Law (Certified Mail)
Coughlan Brothers (Regular Mail)
Mr. John Sieker, U.S.D.A., Forest Service (8)
Regional Solicitor, Department of the Interior (Regular Mail)
Hearings Administrative Officer
Minerals Staff Officer (5)
Appeals List No. 1

LO(Sec)

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 5 Government Contests

The allegations of a complaint are properly taken as confessed where an answer to a complaint in a contest proceeding is not fimely filed. Where a complaint charged lack of discovery and the contestee failed to answer within the period prescribed by the rules of practice, the Manager did properly consider the allegations of the complaint as admitted and declare the mining claims involved null and void.

United States v. Camilla C. Cass et al., Contest 10-340 (California) (June 18, 1959)

LO

In reply refer to:

Contest 10-340 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 18, 1959

Certified Mail
Return Receipt Requested

DECISION

United States v. Camilla C. Cass et al.	: : :	Cash Quartz and Accident Quartz Lode Mining Claims situated in sec. 18, T. 34 N., R. 8 W., M.D.M., California

Decision Affirmed

Mrs. Cass has appealed from a decision of the Manager, Sacramento Land Office, dated December 19, 1958, declaring the Cash Quartz and Accident Quartz mining claims null and void. The decision was premised on a finding that an answer to the complaint was not timely filed within 30 days after the service thereof (January 29, 1958) and the failure to file a denial of the charges within that time is considered an admission of the truth of the charges (that the land is non-mineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery).

The appeal ascribes no error in the decision appealed from. It recites that the appellant's attorneys forwarded an answer to her for signature on February 10, 1958, and that she re-mailed the signed answer to them by certified mail on February 13. The answer was received by the attorneys on March 20, and filed in the Land Office on March 21, Because of such circumstances, she petitions that the answer, filed on March 21, be accepted as timely filed.

In pertinent part the rules of practice provide as follows:

> "Within 30 days after service of the complaint * * * the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint * * *," 43 CFR 221.64.
>
> "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." 43 CFR 221.65 (a).

> "A document is filed in the office where the filing is required only when thedocument is received in that office during the office hours when filing is permitted and the document is received by the person authorized to receive it." 43 CFR 221.92(a).

Further, the complaint served upon the contestee stated that:

> "Unless contestees file an answer to the complaint in such office within thirty (30) days after service of this notice, the allegations of the complaint will be taken as confessed."

The answer, signed by Mrs. Cass, and filed on March 21, bears a verification dated February 24th. Surely then, the answer could not have been in the mails from February 13, to March 20. It follows, even if the facts alleged in the appeal are accepted at face value and the Bureau being bound by the existing regulations, (McKay v. Wahlenmaier, 226 F. 2d 35 (1955)), that the Manager did properly take the allegations of the complaint as confessed and did correctly render decision declaring the claims null and void.

The Manager's decision is affirmed.

Mrs. Cass is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal, the adverse party to be served is:

Regional Solicitor
Department of the Interior
Sacramento 21, California

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:
Hoey, Hoey, Hall & Conti, Attorneys at Law (Certified Mail)
Mrs. Camilla Cass (Regular Mail)
Regional Solicitor (Regular Mail)
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
BF

appeal to Sec.
affirmed A-28189
2-29-60
LO(Sec)

MINING CLAIMS * 3 Contests
* 5 Discovery

A discovery of a valuable mineral deposit is essential to the location of a mining claim under the United States mining laws. An actual discovery of a particular mineral deposit, in quantity and quality sufficient to justify a prudent man in the further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine, is necessary to meet the "discovery" requirements of the mining laws.

United States v. Lucetta A. Hunt et al., Contest Nos. 10-83, 10-120
(June 25, 1959) (Sacramento)

In reply refer to:

Contest Nos. 10-83, 10-120
(Sacramento)
5.04g
June 25, 1959

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
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DECISION

United States v. Lucetta A. Hunt and Donald B. Hunt	:	Rover, Gold Star and Brownie Placer Mining Claims, situated in secs. 19 and 30, T. 35 N., R. 8 W., M.D.M., California

Decision Affirmed

Lucetta A. and Donald B. Hunt have appealed to the Director from a decision of a Hearing Examiner dated June 11, 1958, declaring the Rover, Gold Star, and Brownie Placer Mining Claims null and void.

Adverse proceedings were initiated against the claims on the basis of a complaint charging that the land embraced in the claims is nonmineral in character, and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. A hearing was held before a Hearing Examiner on March 13, 1958. The Hearing Examiner found that the Government had established by a preponderance of the evidence that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery and declared the claims null and void.

The appellants contend, in effect, that the evidence submitted by the Government fails to establish lack of discovery.

The record shows the claims herein involved were located in 1952 for the mineral (gold) contained therein. The testimony adduced at the hearing is accurately summarized in the Hearing Examiner's decision. The Government's mining engineer testified, in substance, that he had examined each of the subject claims and had taken specimens therefrom for assay purposes. He showed that the assays disclosed values from fractions of pennies to 18 cents per cubic yard; a concentrate of black sand from a 91 lb. sample assayed at 52 cents per ton. The mining engineer further testified that showings of mineralization within the claims were spotty and obtained from a clayey material; the clayey material necessitates expensive operations for recovery purposes. He concluded that the quantum of minerals within the claims is so small and cost of operations to make recovery so great that a prudent man would not be justified in the further expenditure of labor or means, with a reasonable prospect of success, in developing a valuable mine on the situs of any of the claims involved in this appeal.

Mr. Hunt testified although he had none of the material from the claims assayed that he was convinced that the soils contain good gold values and that the claims are primarily valuable for their mineral content. He opined that greater gold values than those shown by the Government would be reached at bed rock. He also stated a friend had informed him that certain samplings had indicated gold values of $90 per ton - this apparently from visual examination of the specimen examined and without resort to assay.

In the course of testimony Mr. Hunt stated:

> "I haven't done anything marketable. I have simply been prospecting so far. We have water rights going through Sacramento, and I was waiting to get the water so I could work it. * * *" TR 63.

Later in his testimony he said:

> "The Gold Star, I prospected around some, and I got colors out of there, out of the bottom of my pit there, which was more of an open trench than it was a pit, and Mr. Warkentin also got colors. * * * The pit is not very deep. It consists of clay a lot and in the pan I find more black sand than ordinarily, and it is still my thought that to go down there deep would be a pretty good go. I think it would be worth my time and effort to do such. * * *"

The issue involved appears to be the sufficiency of discovery required to validate a mining location on public lands of the United States. The establishment of a valid placer mining claim is contingent upon the discovery of "valuable mineral deposits" in form other than a vein or lode (30 U.S.C., 1952 ed., secs. 22 and 35). In determining whether mineral deposits discovered on public land are "valuable", the test to be applied is whether they are such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. Cameron v. United States, 252 U.S. 450 (1920); United States v. M. W. Mouat et al., 61 I.D. 289 (1954). Mere indications or a belief in the existence of mineral on a claim do not amount to discovery. United States v. Frank J. Miller, 59 I.D. 446 (1947). Nor would the discovery of an isolated bit of mineral not connected with or leading to substantial prospective values constitute a sufficient discovery. East Tintic Consolidated Mining Company, 40 L.D. 271 (1911) and 41 L.D. 255 (1912).

The Government showed that although bits of mineral are recoverable the lands within the claims are not valuable for mineral exploitation. Mr. Hunt, by his own testimony, indicated, at most, that further exploration or prospecting was necessary to determine whether a valuable mineral deposit warranting exploitation exists within the boundaries of the claims. Until the probable existence of valuable mineral deposits warranting exploitation is demonstrated a prudent man would not be warranted in expending his means and labor, with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905) citing Castle v. Womble, 19 L.D. 455 (1894).

The Hearing Examiner's appraisal of the testimony at the hearing appears to be in accord with the criteria which are recited above as the proper basis for determining the validity of the claim. He found that the mineral examiner had in fact examined each of the claims involved (and no evidence is offered that the mineral examiner did not examine them as testified), and that there has not been an adequate mineral discovery on any of the claims within the meaning of the mining laws. The contestee has not shown by any substantial, probative evidence that the claims have mineral value; at most the record shows only minute traces or indications of gold within the limits of the claims. It follows that "discovery" within the meaning of the mining laws has not been demonstrated and the claims are null and void for want of discovery.

Therefore, the decision appealed from is affirmed.

Mr. and Mrs. Hunt are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 4291, Town and Country
Sacramento 21, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Donald B. Hunt (Certified Mail)
Mrs. Lucetta A. Hunt (Certified Mail)
Minerals Staff Officer (5)
Regional Solicitor
Hearings Administrative Officer
Appeals List No. 1
BF

56242-59

LO(Sac)

LEASABLE MINERALS * 5 Sodium
(Other than oil
and Gas)

It is proper to reject applications for sodium prospecting permits for lands which have been determined to have no value for sodium.

Harvey M. Braswell et al., Los Angeles 0142414, etc. (July 9, 1959)

In reply refer to:

Los Angeles 0142414
0142412
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 9, 1959

Certified Mail
Return Receipt Requested

DECISION

Harvey M. Braswell :
August F. Beck :
: Sodium

Manager's Decisions Affirmed

The above-named individuals have appealed from decisions of the Manager, dated October 31, 1957, and January 20, 1958, respectively, to the extent they rejected their sodium prospecting permit applications under section 23 of the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 261), for lands embraced in allowed desert land entries. The rejections were based on reports of the Geological Survey, dated September 30, 1957, and December 17, 1957, respectively, which found these lands not prospectively valuable for sodium.

The appellants contend that the lands are prospectively valuable for sodium and refer to Bulletin 165 of the California State Division of Mines and to a geophysical survey report by Don Mabey of the U.S. Geological Survey published in the July 1956 edition of "Geophysics" to substantiate this contention. The appellants state the contours suggest a fault similar to the Western Borax fault along which deposits of sodium borates accumulated.

In a supplemental report dated November 28, 1958, after a review of the evidence submitted on appeal, the Geological Survey states there is no indication that sediments in the areas of the requested lands contain any sodium compounds and that no modification of the Survey's previous reports is warranted. The Department has previously held that the Geological Survey's determinations in such respect will not be disturbed in the absence of a clear showing that the determination was improperly made. Cf. Duncan Miller, A-27644 (September 22, 1958).

Sodium prospecting applications for lands embraced in allowed desert land entries not impressed with a sodium reservation are properly rejected, unless it is found that the land is prospectively valuable for sodium.

Accordingly, the Manager's decisions are affirmed.

Messrs. Braswell and Beck are each allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. Braswell, then the adverse parties to be notified by him are:

Mrs. Bessie Cohn
907 North Bedford Drive
Beverly Hills, California

Mr. Edgar L. Stones
2347 Parnell Avenue
Los Angeles, California

Mr. John Pasternack
6611 West Orange
Los Angeles, California

Mr. Arnold Roseman
10456 Tennessee
Los Angeles, California

If an appeal is taken by Mr. Beck, then the adverse parties to be notified by him are:

Mr. Ernest J. Geske
9500 Cedar
Bellflower, California

Mr. Jean E. Geske
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Edward Woozley
Director

Enclosure

Distribution on page 3

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Mr. John Pasternack (Regular Mail)
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Mr. Ernest J. Geske (Regular Mail)
Mr. Jean E. Geske (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (6)
Appeal Lists No. 1
EG

57714-59

LA(Sac)

MINING CLAIMS * 5 Discovery

To satisfy the requirement of discovery on a placer mining claim located for sand gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed, and marketed at a profit.

United States v. Ernest H. Koehler et al., Contest Nos. 6806, 6807, 6828, 6829 (Los Angeles) (July 16, 1959)

In reply refer to:
Contest Nos. 6806, 6807,
and 6828
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 16, 1959

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	:	
v.	:	Dellcliff, Fore, Sun'N'Sand, and
Ernest H. Koehler	:	Mary Ellen Placer Mining Claims
Edna Koehler	:	situated in Sec. 18, T. 1 S., R. 7 E.,
Frank A. Brownlee	:	S.B.M., California
Clara Brownlee, Contestees	:	
Frances M. Keys, Intervenor	:	

Decision Affirmed

The contestees named above have appealed from a decision of the Hearing Examiner, dated August 29, 1958, rejecting mineral patent application, Los Angeles 0120211, for the Sun'N'Sand placer mining claim and declaring that claim as well as the Dellcliff, Fore and Mary Ellen placer mining claims null and void for lack of discovery.

The several claims involved were located on December 5, 7, and 15, 1953, at a time when part or all of the lands in each was covered by an application under the Small Tract Act. All the lands were classified for disposition under that act by California Small Tract Classification No. 395 dated January 7, 1954 and appearing in the Federal Register of January 14, 1954. Contest proceedings against the several claims were initiated by the Bureau through its State Supervisor at Sacramento, California. The complaints charged in pertinent part (1) that the lands embraced within the respective claims are nonmineral in character, (2) that minerals have not been found within the limits of the claims in sufficient quantities to constitute valid discoveries and (3) that all or part of each claim was null and void because located on land under small tract application and the land was subsequently classified for small tract purposes.

In their answers to the complaints the appellants affirmatively averred the claims were valuable for the sand, gravel and/or building stone contained therein and were not void (in whole or in part) by reason of prior small tract applications or subsequent classification. In resolving the issues the hearing examiner found the materials for which the claims were located could not be extracted, removed and marketed at a profit and the claims, therefore, for that reason alone, were void for lack of discovery; he did not pass on the effect, if any, of the small tract applications and classification.

The appellants, in substance, contend the examiner's decision is contrary to law and the weight of evidence.

The examiner's decisions summarize the pertinent testimony offered at the hearings. Concerning the marketability of the deposits the Government, conceding that sand gravel and/or stone is contained within the claims, introduced testimony showing that materials similar to those found within the claims are existent within the general area thereof and that although the entire area (YuccaValley and Twenty-Nine Palms, California) had experienced a great growth in population and stimulated construction since 1954, no substantial quantities of the materials had been removed from the claims. The Government further showed that the operating sand and gravel companies in the area are adequately supplied with materials procured elsewhere and are not interested in the purchase of materials from these claims. It was also shown that he concrete suppliers in the area did not use and do not want any materials from these claims. It was the opinion of the Government witnesses that a reasonably prudent man would not be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a mine on any of the properties and that the materials cannot be extracted, removed and sold at a profit.

Testimony adduced in behalf of the appellants clearly shows that no materials from the claims have ever been sold and no contracts have ever been entered into for the sale of materials. The records indicate the claimants have performed assessment work and that small quantities of sand and stone have been removed either for personal use or by one of the claimants for use in his own construction business.

Under the mining laws of the United States (30 U.S.C. secs. 21 and 22) only "valuable mineral deposits" may be located, and the lands involved must be "valuable for minerals". These laws have been construed to mean that if a deposit in land doesnot render its extraction profitable and justify expenditures to that end, it is not a valuable mineral deposit. Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905). In applying this rule to the deposits under consideration, the Department has held that a showing must be made that the deposits can be removed and marketed at a profit. Layman v. Ellis, 52 L.D. 714 (1929); United States v. Strauss, 59 I.D. 129 (1945); United States v. Foster, 65 I.D. 1 (1958). The mere existence of low grade deposits on public lands even though some slight use may be made commercially of such deposits, is alone insufficient to justify the acquisition of title thereto under the mining laws. Holman et al. v. State of Utah, 41 L.D. 314 (1912); Solicitor's Opinion, M-36295 (August 1, 1955).

The ultimate question to be decided here is whether the claims have been perfected by discovery. Since, to satisfy the requirements of discovery on a mining claim containing materials of widespread occurrence, it must be shown as a present fact that the deposits can be extracted, removed and marketed at a profit (United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959), we will assume - only for the purposes of this decision--that the materials for which the claims were located are of commercial quantity and quality. Nor will it be necessary to determine the effect of the small tract applications and classification or the effect of the act of July 23, 1955 (30 U.S.C., 1952 ed., Supp V., sec. 611), if the materials cannot be marketed at present at a profit.

The appellants made no assertions that materials from the claims could be sold at any place other than in the immediate vicinity of the claims. That area appears to be well supplied with sand, gravel and stone. Based on the evidence that no materials have ever been sold by the appellants and that there is no demand by supply houses or construction companies for the materials, and even though some sand and gravel was used by one of the appellants in his own business, the Examiner found that there is no existing market for those materials and held the claims null and void. The very fact that the claims have been held for over four years during which the area underwent a rapid development during which the appellants were unable to sell any of the materials for building purposes supports the finding that there is no present market for those materials. Estate of Victor E. Hanny, A-27362 (November 9, 1956). 1/

The appellants were unsuccessful in their attempts to establish discoveries on the respective claims, not because of error of law on the part of the hearing officer but rather because of their inability to overcome the evidence submitted by the Government. The findings of fact of the examiner are fully supported by reliable, probative and substantial evidence presented at the hearings and his conclusions that the claims are null and void for want of discovery are fully supported by the record.

Accordingly, the decision appealed from, rejecting patent application Los Angeles 0120211, for the Sun'N'Sand and declaring that claim and the Dellcliff, Fore and Mary Ellen placer mining claims null and void is affirmed.

The appellants herein are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR

1/ The claims can have no validity as building stone placers (30 U.S.C., sec. 161) because the lands on which located were, at time of location, not "chiefly valuable for building stone". (See Estate of Victor E. Hanny, A-26280 (March 5, 1952) and 63 I.D. 369 (1956). The lands in December 1954 were chiefly valuable for small tract development.

Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse parties to be served are:

Regional Solicitor
Department of the Interior
P. O. Box 4291, Town and Country Area
Sacramento 21, California and,
Miss Frances M. Keys
P.O.Box 114, Joshua Tree, California.

Earl J. Thomas

Enclosure

Acting Director

DISTRIBUTION:

Mr. and Mrs. Ernest H. and Edna Koehler (Certified Mail)
Mr. and Mrs. Frank A. and Clara Brownlee (Certified Mail)
Miss Frances M. Keys (Regular Mail)
Minerals Staff Officer (3)
Regional Solicitor, Department of the Interior (Regular Mail)
Hearings Administrative Officer
Appeals List No. 1
BF

LEASABLE MINERALS * 5 Sodium
(Other than Oil and Gas)

Upon cancellation of a prospecting permit for any reason, the land will not be open to sodium permit applications until the cancellation is noted on the records of the land office. It is a time-honored administrative rule that the tract book is the official record of the land office for notation purposes.

Bianca Schultze and Siegfried Schultze (Los Angeles 0149463 etc.)
(August 18,1959)

In reply refer to:
Los Angeles 0149463
0149464
0149684
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 18,1959

Certified Mail
Return Receipt Requested

DECISION

Bianca Schultze : Sodium
Siegfried Schultze :

Decisions Affirmed

Bianca and Siegfried Schultze have appealed from separate decisions of the Chief, Minerals Adjudication Unit, dated January 8 and 9, 1958, which rejected, in part, 1/ their above-noted sodium prospecting permit applications filed on or prior to June 3, 1957 under the provisions of the Mineral Leasing Act of 1920, as amended (30 U.S.C., 1952 ed., secs. 261-263) on the basis that the rejected lands were included in outstanding permits, which were cancelled on March 29, 1957, and the tract books were not noted until in September 1957 and in one instance not until December 1958.

The appellants state that the Manager was in error and contend, since the regulations (43 CFR 195.11) merely say "noted on the records of the land office" that notation of the "case book" (referring to the serial register) sufficed to make the lands available. He contends, further, since the permits are issued" for two years only" that the land became available on the day following the two-year term.

The appellant's contentions are without merit. The regulation (43 CFR 195.11) is specific:

> "Cancelled Permits. Upon cancellation of a sodium permit for any reason, the land will not be open to sodium permit applications until the cancellation is noted on the records of the land office."

In a land office the tract book is the official record available to the public upon which it may rely when notations are made affecting the status of land. The notation rule has been a time-honored administrative rule for over half a century. It has been followed consistently in a variety of different types of entries and situations. W. V. Moore, 64 I.D. 422 (1957).

1/ By previous decisions dated January 3, 1958 the Manager rejected the applications as to lands in conflict with prospecting permits Los Angeles 087978, 087979, 087980 and 088414 on which there had been a discovery.

For the reasons given, the Manager's decision is considered correct and is affirmed.

Bianca and Siegfried Schultze are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Bianca and Siegfried Schultze, the adverse parties to be served are:

P. R. McClung
P. O. Box 486
Azusa, California

Amysue Choate
2712 First National Bldg.
Oklahoma City 2, Oklahoma

Josephine Ray
2700 First National Bldg.
Oklahoma City 2, Oklahoma

Patty Bicknell
2707 First National Bldg.
Oklahoma City 2, Oklahoma

Pat Surber
2701 First National Bldg.
Oklahoma City 2, Oklahoma

William D. Curlee
2700 First National Bldg.
Oklahoma City 2, Oklahoma

J P Beirne
Acting Director

Enclosure

DISTRIBUTION:

All adverse parties shown above (Regular Mail)
Mrs. Bianca Schultze (Certified Mail)
Mr. Siegfried Schultze (Certified Mail)
Minerals Staff Officer (3)
Geological Survey (9)
Appeals List No. 1
EG

LEASABLE MINERALS * 5 Sodium
(Other than oil and gas)

Where lands are not available for the filing of sodium prospecting permit applications at the time an application is filed, the application is invalid and must be rejected.

Jean M. Owen, Los Angeles 0151465 (October 5, 1959)

In reply refer to:
Los Angeles 0151465
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 5, 1959

Certified Mail
Retunr Receipt Requested

DECISION

Jean M. Owen : Sodium

Decision Affirmed

Miss Jean M. Owen appealed from a decision of the Chief, Mineral Adjudication Unit, Los Angeles Land Office, dated May 6, 1959 which rejected her application for a sodium prospecting permit on the basis that some of the lands applied for have been classified as valuable for leasing, some are embraced in a preference right lease, and other lands were formerly in sodium prospecting permits which had been cancelled but the cancellating was not noted on the tract book at the time this amended application was filed on June 24, 1957.

This appeal concerns rejection as to the lands in prior sodium prospecting permit where cancellation had not been noted on the tract books and the lands which were classified as valuable for leasing by the Geological Survey. The appellant contends, in substance, since notation of the cancellation was made on the case record, that these lands were available for the issuance of a prospecting permit, and, further, as to the lands rejected because they were classified as valuable for leasing, that such classification had not been made at the time her application was filed. She questions that the character of the lands justify a classification of valuable for sodium.

Where the lands are not available for the filing of sodium prospecting permit applications at the time an application is filed, the application is invalid and must be rejected. Cf. Elwyn C. Hale, 62 I.D. 19 (1955). The notation of a case record cannot serve as notification to the public. Numerous Departmental decisions have held that it is the notation of the land office tract books that determines when action is taken. See Eugenie Bate et al., A-27861 (March 3, 1959) and cases included therein, including W. V. Moore, 64 I.D. 419 (1957).

Classification of lands may be made at any time before final action is taken on an application. The Director of the Geological Survey is the official expert, expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." (43 U.S.C., sec. 31, Carl Nyman, 59 I.D. 238). The department has held that the Geological Survey's determination in such respect will not be disturbed in the absence of a clear showing that the determination was improperly made. Cf. Duncan Miller, A-27644 (September 22, 1958). No such showing has been made in this appeal. The decision of the land office was correct, and it is affirmed

Miss Owen is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If appeal is taken by Miss Owen, then the adverse party to be served is:

Searles Lake Chemical Corporation
1708 Union Commerce Building
Cleveland 14, Ohio

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Miss Jean M. Owen (Certified Mail)
Searles Lake Chemical Corporation (Regular Mail)
Mineral Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
EG

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

5.04a

October 28, 1959

Memorandum

To: State Supervisor, Nevada

From: Director, Bureau of Land Management

Subject: Case of Everett Foster, et al., v. Fred A. Seaton

Attached for your information is a copy of a decision handed down on October 22 by the United States Court of Appeals for the District of Columbia in the case of Everett Foster, et al., v. Fred Seaton.

In this decision the court upheld the action of the Bureau in declaring certain sand and gravel claims null and void. One of the interesting aspects of this case is that the court affirmed the ruling that a mining claimant must show the existence of present demand and marketability of a non-metallic mineral of widespread occurrence to justify the possession of land under a mining location.

For the Director

Max Kaplan

Attachment

Copy to: Area Administrators
State Supervisors

United States Court of Appeals

For the District of Columbia Circuit

DEPT. OF INTERIOR
SACRAMENTO, CAL.
NOV 12 11 35 AM 1959
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

No. 14953

Everett Foster, Et Al., Appellants

v.

Fred A. Seaton, Secretary of the Interior, Appellee

Appeal from the United States District Court
for the District of Columbia

Decided October 22, 1959

Before Prettyman, Chief Judge, and Bazelon and Burger, Circuit Judges.

Per Curiam: This case relates to appellants' claims under provisions of the mining laws which authorize "occupation and purchase" of Government lands containing "valuable mineral deposits." Rev. Stat. § 2319, 2325, 2329 (1875), 30 U.S.C. §§ 22, 29, 35 (1952). The Department of the Interior instituted proceedings contesting the claims on the ground that the allegedly "valuable mineral deposits" of sand and gravel, located thirteen miles from the center of Las Vegas, Nevada, were insufficient, inter alia, in quantity, quality and accessibility to a market to constitute a valid discovery. The hearing officer rendered a decision favorable to appellants, but it was reversed by the Director of the Bureau of Land Management upon an appeal by rival claimants who had intervened to assert an interest in the land under the Small Tract Act, 68 Stat. 239 (1954), 43 U.S.C. § 682(a) (Supp. V 1958). The Secretary of the Interior sustained the Director's ruling. Appellants then instituted this suit in the District Court under the Administrative Procedure Act to review the Secretary's decision. On cross motions, the District Court granted a summary judgment in favor of appellee and this appeal followed.

Appellants have raised a number of points relating to errors of procedure and statutory interpretation allegedly committed throughout the administrative process. We have examined them carefully and find no merit in the contentions. We discuss them briefly.

Appellants claim that they were prejudiced because intervenors were improperly admitted to the hearing, and that, without such intervention, the ruling of the initial hearing examiner in favor of appellants would never have been appealed and hence never reversed.[1] It is clear, however, that the intervenors as rival claimants for the land under the Small Tract Act, allowing the Secretary to lease or sell vacant Government lands for certain residential and commercial uses, were interested parties. We find no basis for disturbing the administrative action with respect to this intervention.

Appellants also contend that the hearing examiner erroneously denied their request to examine a confidential document from which a Government witness was testifying. The record shows that upon the witness' claim of a governmental privilege appellants' counsel withdrew his request for disclosure. Thereafter the hearing officer expressly stated that he would, if again requested, rule in appellants' favor. Since the objection was not revived, the point is plainly not now available to appellants.

Appellants' third allegation of error is that the Secretary failed to hold the Government to the standard of proof required by the Administrative Procedure Act, which states that "the proponent of a rule or order shall have the burden of proof." 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1952). The Secretary ruled that, when the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid.[2] The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. One who has located a claim upon the public domain has, prior to the discovery of valuable minerals, only "taken the initial steps in seeking a gratuity from the Government." Ickes v. Underwood, 78 U. S. App. D. C. 396, 399, 141 F.2d 546, 549, cert. denied, 323 U.S. 713 (1944); Rev. Stat. 2319 (1875), 30 U.S.C. § 23 (1952). Until he has fully met the statutory requirements, title to the land remains in the United States. Teller v. United States, 113 Fed. 273, 281 (8th Cir. 1901). Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary.

---

[1] The Government was apparently willing to allow the hearing examiner's ruling to stand.

[2] This is the standard which the Department of Interior has applied for a number of years. See United States v. Strauss, 59 I.D. 129 (1945).

Appellants' principal assignment of error is that the Secretary misinterpreted the statute by requiring a demonstration of present value. They earnestly contend that their claim can also be sustained on the basis of prospective market value.

The statute says simply that the mineral deposit must be "valuable." Rev. Stat. § 2319, 30 U.S.C. § 22. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in Castle v. Womble, 19 I.D. 455, 457 (1894):

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a "mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit." Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956). Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development.

Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence on the record as a whole. We think it was. There may have been substantial evidence the other way also, but we do not weight the evidence. The testimony of Shafer and his colleagues in support of the Government was clearly substantial and most certainly was not destroyed. He was an experienced man, knew sand and gravel, knew the Las Vegas area, and his testimony was clear, succinct and convincing.

Affirmed.

DEPT. OF INTERIOR
SACRAMENTO, CAL.

NOV 12 11 35 AM 1959

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

LEASABLE MINERALS * 5 Sodium
(Other than oil and gas).

Where lands were granted to the Metropolitan Water District, California under the act of June 18, 1932; HELD: A sodium prospecting permit covering those lands is properly cancelled because the act prohibits the further disposal of the minerals in the leasing of the lands except as "hereafter expressly directed by law" and no law has been enacted allowing the leasing thereof under the provisions of the Mineral Leasing Act.

David Pattison, Los Angeles 0139525 (November 10, 1959)

RO

In reply refer to:

Los Angeles 0139525
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 10, 1959

Certified Mail
Return Receipt Requested

DECISION

David Pattison : Sodium Prospecting Permit
: Involving sec. 14, T. 2 N.,
: R. 17 E., S.B.M., California.

Decision Affirmed

Mr. Pattison has appealed from a decision of the Chief, Mineral Adjudication Unit, Los Angeles Land Office, dated November 20, 1958, cancelling his sodium prospecting permit as to sec. 14, T. 2 N., R. 17 E., S.B.M., California. The decision, in effect, held that section 14 is within a grant to the Metropolitan Water District of Southern California and not leasable under the provisions of the Mineral Leasing Act, as amended, (30 U.S.C., sec. 261).

Section 1 of the act of June 18, 1932 (47 Stat. 324) provides for grants of certain lands to the Metropolitan Water District for certain uses and provides that the grant of land is "subject to the reservation, until their disposition is hereafter expressly directed by law, of all minerals except earth, stone, sand, gravel and other minerals of like character ***". Section 5 provides that "On the cessation of use of the land granted for the purposes of the grant the estate of the grantee or of its assigns shall terminate and revest in the United States."

A grant of the land involved was approved to the District by decision of May 31, 1951 (Bureau decision, Los Angeles 082722).

In spite of the prohibition against the disposal of the minerals in the lands "until their disposition is hereafter expressly directed by law", and no such direction having been made by law, a sodium prospecting permit was issued to the appellant. That permit was issued without authority of law and in derogation thereof and was a nullity even at the time of issuance. In view thereof the cancellation thereof was correct and proper.

The decision cancelling the permit is affirmed.

We have carefully considered the arguments on appeal. Even though the District may now consent to the leasing (permitting) of the land, nevertheless, in view of the prohibition to the disposition of minerals, its consent may not serve to vest in the Bureau authority expressly prohibited by law. Further, the argument that the grant has revested in the Government because of non-use of the land by the District is not tenable. The grant remains vested in the grantee until voluntarily relinquished by it or until title reverts and is revested in the United States after proper legal procedures declaring the forfeiture thereof.

Mr. Pattison is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Chester M. Kempley (Certified Mail)
Mr. David Pattison (Regular Mail)
Mr. Robert B. Diemer (Regular Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

appeal to Sec
affirmed A-28342
7-18-60 LO(sa)

LEASABLE MINERALS * 1 Generally (Acquired Lands)
(Other than oil and gas)

The provisions of 43 CFR 200.31 et seq. require that acquired lands, subject to those regulations, be leased competitively where the lands are known to contain valuable deposits of the mineral sought for leasing.

Lowell Thompson et al., Idaho 010115, 010331 (November 19, 1959)

RD

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Idaho 010115
010331
5.04g

November 19, 1959

Certified Mail
Return Receipt Requested

DECISION

Lowell Thompson
Henry C. Craig

:
Mineral Permit Applications filed under
: 43 CFR 200.31 et seq. involving the
S½SW¼ sec. 33, T. 43 N., R. 1 E.,
: B. M. Idaho

Applications Rejected
Cases Remanded

Mr. Thompson has appealed from a decision of the Manager, Boise Land Office, dated May 19, 1959. That decision, in effect, held that the garnet prospecting permit application of Mr. Thompson, Idaho 010115 was junior to that of Mr. Craig's, Idaho 010331, insofar as the applications conflicted as to the SW¼SW¼ sec. 33.

For the reasons outlined below, the question concerning seniority of filing is moot and will not be considered.

The Geological Survey has reported that prospecting is not necessary to determine the presence of garnet in the S½SW¼ sec. 33 and that others may be interested in leasing the land. It has recommended that the land involved be offered for lease by competitive bidding under certain terms and conditions.

Therefore, since the regulations 1/ provide for leasing by competitive bidding where the land is known to contain valuable mineral deposits, the prospecting permit applications for those deposits must be rejected.

Accordingly, applications 010115 and 010331 are rejected.

1/ 43 CFR 200.39(a) providing that "Except for preference right leases, as set out in the preceding section, leases for lands containing valuable mineral deposits will be issued only to the qualified person who offers the highest bonus by competitive bidding, either by oral auction or sealed bids, or both, as provided in the published notice inviting bids for the issuance of a lease covering such deposits".

Messrs. Thompson and Craig allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Earl J Thomas

ACTING Director

Enclosure

DISTRIBUTION:

Mr. Lowell Thompson, (Regular Mail)
Wellman Clark, Attorney at Law (Certified Mail)
Mr. Henry C. Craig (Certified Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
Mr. John Sieker, Forest Service, U. S. Department of Agriculture
BF

63957

MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under Public Law 167-84C. is the maximum time allowable for such purpose, and it may not be extended.

F. E. Wetmore, PL 11-44 (Sacramento) (November 20,1959)

In reply refer to:

PL 11-44 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 20, 1959

Certified Mail
Return Receipt Requested

DECISION

F. E. Wetmore : Bald Mountain Addition Placer Mining Claim situated in secs. 22 and 23 T. 19N., 10 E., M.D.M., California.

Decision Affirmed

Mr. Wetmore has appealed from a decision of the Manager, Sacramento Land Office, dated June 8, 1959, rejecting his verified statement, filed May 8, 1959, under section 5 of the act of July 23, 1955 (30 U.S.C. sec. 613 (a); Public Law 167-84C.). The statement was rejected for the reason that it was not timely filed, that is, within 150 days from March 14, 1957, the date of first publication of notice that the filing of such a statement was required. The statement was filed more than two years after the date of the first publication.

The appellant concedes that the verified statement was not timely filed. He asserts that he had no knowledge of the publication.

The Department has held that the 150-day statutory period in which to file under the act of July 23, 1955, is the maximum time allowable for such purpose, that such period may not be extended by the Department and that a verified statement required under the act is properly rejected and the claim (use of surface resources) is subject to the terms and limitations of section 4 of the act where the required statement is not timely filed. Hines Gilbert Mines Company, 65 I.D. 481 (1958). It follows that since the required statement was not timely filed, the decision rejecting the verified statement was proper.

Accordingly, the Manager's decision is affirmed.

Mr. Wetmore is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Earl J Thomas
Acting Director

Enclosure

DISTRIBUTION:

Mr. F. E. Wetmore (Certified Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

63937-59

LEASABLE MINERALS (Other than oil and gas) * 5 Sodium

Under the Mineral Leasing Act, as amended, 30 U.S.C., secs. 261-263, lands known to contain valuable deposits of sodium are subject to lease only through competitive bidding, and a prospecting permit may not be issued for such land.

The finding of the Geological Survey that lands are known sodium lands will not be disturbed in the absence of convincing proof to the contrary.

P. R. McClung, Los Angeles 0107853 November 27, 1959

In reply refer to:

Los Angeles 0107853
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 27, 1959

Certified Mail
Return Receipt Requested

DECISION

P. R. McClung : Sodium Permit Application
:
:

Manager's Decision Affirmed

Mr. McClung has appealed from a decision of the Chief, Minerals Adjudication Unit, Los Angeles Office, dated May 28, 1959 which rejected his above-identified application for a sodium prospecting permit filed under section 23 of the Mineral Leasing Act of 1920, as amended (30 U.S.C., 1952 ed., sec. 261) as to the SE¼NW¼ sec. 5, T. 26 S., R. 43 E., M.D.M., California on the ground that, according to the geological survey's report dated April 3, 1959, this land lies within an area delineated as containing a valuable deposit of sodium and is therefore subject only to the leasing provisions of the Act.

In a supplemental report, dated September 23, 1959, the Director, Geological Survey after consideration of material submitted with the appeal, reports that a test hole drilled by them within one-third mile of the subject land has been logged in detail and shows considerable thicknesses of saline deposits demonstrating that the land is well within the area administratively determined to be subject to leasing rather than prospecting.

The Director of the Geological Survey is the official expert expressly entrusted by Congress with the "classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain." (43 U.S.C., sec. 31, Carl Nyman, 59 I.D. 238). The department has held that the Geological Survey's determination in such respect will not be disturbed in the absence of a clear showing that the determination was improperly made. Cf. Duncan Miller, A-27644 (September 22, 1958). No such showing has been made in this appeal. The decision of the land office was correct and it is affirmed.

Mr. McClung is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken by Mr. McClung, then the adverse parties to be served are:

Mr. Frank M. Darrow
P.O. Box 1198
Trona, California

Mr. C. D. Jones
Statler Center, Room 412
900 Wilshire Blvd.
Los Angeles 17, California

Acting Director

Enclosure

DISTRIBUTION:
Mr. P. R. McClung (Certified Mail)
Adverse Parties (Regular Mail)
Mineral Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
EG

LEASABLE MINERALS (OTHER THAN OIL AND GAS) * 5 Sodium

Under the Mineral Leasing Act, as amended, 30 U.S.C., secs. 261-263, lands known to contain valuable deposits of sodium are subject to lease only through competitive bidding, and a prospecting permit may not be issued for such land.

The findings of the Geological Survey that lands are known sodium lands will not be disturbed in the absence of convincing proof to the contrary.

James Hay, Los Angeles 0151804 (December 18, 1959)

In reply refer to:

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Los Angeles 0151804
5.04g

December 18, 1959

Certified Mail
Return Receipt Requested

DECISION

James Hay : Sodium Prospecting Permit Application

Decision Affirmed

Mr. Hay has appealed from a decision of April 9, 1959, rejecting his application for a sodium prospecting permit, filed under the provisions of section 23 of the Mineral Leasing Act (30 U.S.C. sec. 261). The application was rejected for the reason that the lands are known to be valuable for sodium, have been so classified by the Geological Survey and are leasable only under section 24 of the Act (30 U.S.C. sec. 262).

The appellant asserts that the classification of the land as known valuable sodium lands is in error.

In Frank M. Darrow, A-27614 (July 30, 1958) it was held that an application for a sodium prospecting permit is properly rejected when the applicant fails on appeal to submit any evidence which tends to disprove a determination made by the Department that the lands applied for are known to contain valuable deposits of sodium and are subject to leasing only.

The appellant has submitted no evidence to controvert the classification of the lands as known sodium lands. His appeal contains assertions and allegations similar to those previously considered by the Bureau in the Darrow case, supra, and in Edwin M. Scott, Jr., et al., Los Angeles 0104433, September 13, 1957, approved by the Assistant Secretary of the Interior on September 26, 1957. No reason has been submitted warranting a change in the classification of the lands under application.

Inasmuch as the leasing of lands known to contain valuable deposits of sodium by competitive bidding is mandatory if the lands are to be leased at all, a prospecting permit for lands known to contain commercially valuable deposits may not be issued. Burnham Chemical Co. v. Krug, 81 F. Supp. 911, 181 F. 2d 288, 340 U.S. 826.

The decision rejecting the prospecting permit application is affirmed.

Mr. Hay is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. James Hay (Certified Mail)
Geological Survey (3)
Minerals Staff Officer (3)
Appeals List No. 1
BF

DOCKET FILES

[illegible]

[illegible]

[illegible]

appeal to Sec
affirmed A-28386 - 9-19-60

DOCKET FILES

MINING CLAIMS * 5 Discovery

To satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed, and marketed at a profit.

United States v. E. J. Fife et al., Contest No. 6843 (Los Angeles) (January 18, 1960)

40

In reply refer to:

Contest No. 6843 (Los Angeles)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

January 18, 1960

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant : Virginia Dale, Upper Claim and
v. : East Quarter Placer Mining Claims
E. J. Fife and : Situated in secs. 30 and 31, T. 4 N.,
Eugene M. Fife, Contestees : R. 1 E., S.B.M., California

Decision Affirmed

The Messrs. Fife have appealed from a decision of the Hearing Examiner, dated April 21, 1959, declaring the Virginia Dale, Upper Claim and East Quarter placer mining claims null and void.

Contest proceedings against the mining claims involved in this appeal were initiated by the Bureau of Land Management.* The mining claims were located on November 6 and 7, 1954. The complaint charged that the lands within the claims are nonmineral in character and that minerals had not been found within the limits of the claims in sufficient quantities to constitute valid discoveries. The appellants denied the charges and affirmatively alleged the claims had been validated by discovery and were valuable for the sand and gravel deposits contained therein.

At a hearing, conducted December 12, 1958, the Government introduced the evidence of a qualified mineral examiner. Concerning the Virginia Dale, he stated the deposits therein were indistinguishable from any other deposits of decayed igneous origin (diorite) and did not contain sand and gravel of commercial quality or quantity usable for construction purposes. He stated, concerning the Upper Claim and East Quarter, that the sand and gravel contained therein were usable in construction work only after screening and processing. It was his conclusion, after having studied market conditions and considering the probable growth of communities and dwellings in the Lucerne Valley, that the materials from the three claims could not be extracted, removed and marketed at a profit and that a prudent man would not be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine on any of the properties.

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* The mining claims cover lands which conflict with applications of the State of California for State Indemnity Selections.

The contestees, testifying in their own behalf, stated that the claims were valuable for the sand and gravel contained therein and represented the Virginia Dale to be valuable for other deposits of widespread occurrence as well as sand and gravel. Their testimony clearly shows that they explored various avenues looking toward disposal of the materials; whether they were merely feeling the market or actually seeking contracts from prospective purchasers, the fact remains that they were unable to negotiate any contracts for the sale of materials from the claims since the location of the mining claims.

They indicated strong belief that a market could and would be developed and indicated present willingness and financial ability to invest money and labor in the development of the claims.

The Hearing Examiner found the materials from the three mining claims are not susceptible to extraction, removal and marketing at a profit; he declared the claims null and void.

The appellants contend that the quality and quantity of the deposits are shown sufficient for commercial use and for that reason alone the validity of the claims is established. They assert it is not necessary to establish marketability of the deposits at a profit in order to show a discovery within the meaning of the mining laws.

Under the mining laws of the United States (30 U.S.C., secs. 21 and 22) only "valuable mineral deposits" may be located, and the lands involved must be "valuable for minerals." These laws have been construed to mean that if a deposit in land does not render its extraction profitable and justify expenditures to that end, it is not a valuable mineral deposit. Chrisman v. Miller, 197 U.S. 313 (1905). In applying this rule to materials of widespread occurrence, the Department has held that a showing must be made that the deposits can be extracted, removed and marketed at a profit. United States v. Foster, 65 I.D. 1 (1958). The mere existence of low grade deposits on public lands even though some slight use may be made commercially of such deposits, is alone insufficient to justify the acquisition of title thereto under the mining laws. Holman et al., v. State of Utah, 41 L.D. 314 (1912); Sol. Op., M-36295 (August 1, 1955). In Everett Foster et al., v. Fred A. Seaton, etc., the United States Court of Appeals for the District of Columbia Circuit (No. 14953, October 22, 1959) said-

> " * * *With respect to widespread non-metallic minerals such as sand and gravel, * * *the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such ' a mineral locator or applicant to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.' Layman v. Ellis, 54 I.D. 294, 296 (1933) * * *. We find no basis for disturbing the Secretary's ruling. * * *"

Even if the deposits on the Virginia Dale, Uppler Claim and East Quarter were locatable in November 1954, the claims would be without validity if the materials cannot now be marketed at a profit.

The testimony of the appellants indicates the claims were not located for a market existing in November 1954, but for a market to be developed in the future. An existing market at time of location was not shown to exist. The very fact that the claims have been held for over four years during which time the appellants were unable to sell any of the material or negotiate contracts for the sale thereof, supports the finding that they could not at any time, since the date of location, extract, remove and market the material at a profit. See *United States* v. *Lem A. and Elizabeth D. Houston*, 66 I.D. 161 (1959). "To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development." *Foster* v. *Seaton*, *supra*.

The appellants were unsuccessful in their attempt to establish discoveries on the mining claims, because of their inability to overcome the evidence submitted by the Government. The findings of fact of the examiner are fully supported by reliable, probative and substantial evidence presented at the hearing and his conclusion declaring the claims null and void for want of discovery is fully supported by the record.

The decision of the Hearing Examiner is affirmed.

Messrs. Fife are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5.00 for *each* mining claim included in the appeal. If the appeal covers all the claims adversely affected by this decision the total filing fee is $15.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 4291
Sacramento 21, California

Edward Woozley
Director

Enclosure
DISTRIBUTION:
E. John Eriksson, Attorney at Law (Certified Mail)
E. J. Fife (Regular Mail)
Eugene M. Fife (Regular Mail)
Minerals Staff Officer (5)
Administrative Hearings Officer
Appeals List No. 1
BF

DOCKET FILES

MINING CLAIMS * 16 Application for Patent
* 3 Contests

Where a contestant, the Forest Service, sought relief in that a mineral patent application be rejected (because of lack of discovery) and the relief was granted, and the Hearing Examiner found the mining claim null and void: HELD: Since no public interest, fraud or bad faith is involved and the land is mineral in character, the decision insofar as it declared the claim invalid is vacated; and the contestee's rights in the claim remain the same as they were before the patent application was filed and as they would be if no patent application had ever been filed.

Where the Government, in a contest proceeding, makes a prima facie showing of invalidity, the risk of non-persuasion rests upon the patent applicant (contestee) to establish the validity of his mining claim.

United States v. Charles R. Cartmel, Contest 5252 (Sacramento) (Supplemental)
(Feb 2, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Contest No. 5252
(Sacramento)
5.04g

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DECISION

United States :
v. : Mining Claim
Charles R. Cartmel :

Hearing Examiner's Decision Vacated in Part
Rejection of Mineral Patent Application Affirmed

By departmental decision, A-28095, of November 16, 1959, the record in the above-captioned contest proceeding was remanded to us with instructions to reconsider the record de novo and our decision of March 20, 1959, and for rendition of a further decision on the merits. Decision is herewith promulgated pursuant to those instructions.

The Forest Service, on May 31, 1956, advised that "protest is made against the issuance of patent on the ground that no discovery" has been made within the meaning of the mining laws within the limits of the Gold Wedge lode mining claim. The protest was made part of the complaint. The complaint contained no prayer for relief other than that requested in the protest. Notwithstanding that prayer was made only in that the mineral patent application be rejected, the Hearing Examiner, by decision of September 3, 1957, held the mining claims null and void for lack of discovery.

In our previous decision we found the Government had made a *prima facie* case and the burden of going forward with the evidence then shifted to the contestee.

The appellant presented considerable evidence to establish the validity of a discovery. He showed a mint receipt to establish the value of ore removed at or near the boundary line of the Gold Wedge and Red Cloud mining claims.

The Department has held it to be the obligation of an applicant for mineral patent to keep discovery points available for inspection by Government mineral examiners. United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959). Since the situs of ore removal is flooded and not now available or susceptible to examination, the Government has no way of ascertaining whether the alleged vein is in place and bears sufficient value to sustain a mining location or whether the mineral bearing vein has been mined out and the discovery lost. Clearly, in such circumstances, the mint report, even if otherwise acceptable at face value, is not the convincing evidence necessary to sustain a patent application.

The evidence presented by both parties establishes the land within the Gold Wedge to be mineral in character. The assays of samples taken in behalf of the Government are consistently low in value and indicate that a prudent man would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. On the other hand, the appellant submitted assay reports indicating contrariwise. Considering all the testimony, the weight to be assigned to the mint report, exhibits and expert testimony and resolving doubts in favor of the contestee, the evidence to establish the validity of discovery appears, at best, to be in equipoise.

But the risk of non-persuasion rests upon the patent applicant. Even though the evidence may be in balance, the appellant's evidence falls short of clearly establishing his right to patent; it was correct and proper for the Hearing Examiner to reject the mineral patent application. The decision below, to that extent, is affirmed.

The objective of the mining laws is to encourage and protect legitimate mining claimants who discover and develop mineral resources on the public domain. And "where a mineral applicant's right to patent is assailed in proceedings charging lack of discovery, and no public interest, adverse claim, fraud, or bad faith is involved, it has been the uniform practice of the Land Department upon a finding that there was no sufficient discovery of mineral on the claim or claims involved, to merely reject the application * * *. The existence of this practice is shown by numerous reported and unreported cases. The object of the attack being merely the application for patent, the rejection of the application for want of a discovery that justifies the issuance of a patent accomplishes that object." Park Premier Mining Co., A-20241 (May 23, 1936). Also see United States v. Margherita Logomarcini, 60 I.D. 371 (1949); United States v. John Giulio, A-27842 (February 6, 1959).

The contestant sought relief only in that the patent application be rejected. The relief has been granted. In that posture the contestee's rights in the claim remain the same as they were before the patent application was filed and as they would be if no patent application had ever been filed. The Hearing Examiner's decision, insofar as it declared the Gold Wedge Lode mining claim null and void, is vacated.

The appellant may renew his application for mineral patent to the Gold Wedge Lode at such time as he believes he can establish his right thereto.

The Forest Service and Mr. Cartmel are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal by Mr. Cartmel the adverse party to be served is:

United States Dept. of Agriculture
Office of the General Counsel
212 Federal Office Building
Civic Center
San Francisco 2, California

In the event of an appeal by the Forest Service, the adverse party to be served is Mr. Charles R. Cartmel, through his attorney:

Mr. Charles L. Gilmore
1007 Seventh Street
Sacramento 14, California

Earl J. Thomas
Director
(acting)

Enclosure

DISTRIBUTION:

Mr. Charles L. Gilmore, Attorney at Law (Certified Mail)
Office of the General Counsel, U.S.D.A., San Francisco (Certified Mail)
Mr. Charles Cartmel (Regular Mail)
Regional Forester (Regular Mail)
Mr. John Sieker, Forest Service, U.S.D.A. (8)
Mr. R. L. Tremaine, Forestry & Lands Div., Office of the General Counsel, U.S.D.A. (2)
Hearings Administrative Officer
Hearing Examiner, Sacramento, California
Minerals Staff Officer (5)
Appeals List No. 1
BF

L(Sec)

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

Where a mining claim is located after August 11, 1955, on land withdrawn for power-site purposes and included within an operating project and has not been restored under section 24 of the Federal Power Act HELD: The land is not subject to mineral location being excepted from the general provisions of the Act of August 11, 1955, by reason of the third proviso of section 2, and the claim so located is null and void.

Vandegrift Mining Association, ML 181 (Sacramento) (March 17, 1960)

In reply refer to:

ML 181 (Sacramento)
5.04g
March 17, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

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DECISION

Vandegrift Mining Association	:	Meadowbrook Placer Mining Claim Situated in the S½NE¼ sec. 2, T. 23 N., R. 3 E., M.D.M., California.

Mining Claim Declared Null and Void

Vandegrift Mining Association has appealed from that portion of a decision of the Manager, Sacramento Land Office, dated October 23, 1959, which rejected its notice of location for the Meadowbrook Placer mining claim. The location notice was filed in purported compliance with the act of August 11, 1955 (30 U.S.C. secs. 621-625; 69 Stat. 681. It was rejected for the reason that the lands embraced within the mining claim were withdrawn and included in Power Project No. 803, an operating project licensed October 12, 1929, for a period of 50 years to the Pacific Gas and Electric Company, and not subject to location, such lands being excepted from the provisions of P.L. 359 by reason of the third proviso of section 2. (30 U.S.C. sec. 621(a)).

No error is assigned to the Manager's decision. The appeal is merely a recitation to the effect that the greater part of the lands is not used for Project 803 and that mining operations would not adversely affect the purposes for which the land was withdrawn.

Prior to the passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). Although the act removed, in the main, power-site withdrawals as a bar to locations made thereafter on lands so withdrawn, it excepted from the act such lands "which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress".

The land here involved was withdrawn for power-site purposes; it is included within an operating project under a license issued by the Federal Power Commission. As to it the act did not change the existing law but specifically excepted it from the provisions of the statute.

Therefore, since the land was not restored to entry under section 24 of the Federal Power Act on date of location, August 3, 1959, the Meadowbrook Placer mining claim is null and void.

This decision is without prejudice. The appellant may petition the Federal Power Commission for restoration of the land under the aforesaid section 24; if restored the land will then be subject to mineral location. See 43 CFR Part 103.

Vandegrift Mining Association is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Earl D Thomas
(Acting) Director

Enclosure

DISTRIBUTION:

Mr. Lucian B. Vandegrift, Attorney at Law (Certified Mail)
Minerals Staff Officer (5)
Federal Power Commission (2)
Regional Forester
Appeals List No. 1
BF

appeal to be affirmed A-28482 11-28-60

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

A mining claim located in 1940 on lands withdrawn for powersite purposes is null and void *ab initio* where the lands had not been restored under sec. 24 of the Federal Power Act at the time of location. Although the lands were subsequently restored subject to sec. 24, and notwithstanding the enactment of P.L. 359-84C, the claim may not now be validated where the land is presently withdrawn for first form reclamation purposes.

Fred Orebaugh, Sacramento PL 6-10 (March 24, 1960)

In reply refer to:

Sacramento PL 6-10
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 24, 1960

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DECISION

Fred Orebaugh : Betty Mining Claim situated in the
: S$\frac{1}{2}$ sec. 15 and N$\frac{1}{2}$ sec. 22, T. 27 S.,
: R. 32 E., M.D.M., California

Decision Affirmed

Mr. Orebaugh has appealed from a decision of November 23, 1959, declaring the Betty mining claim null and void.

A verified statement filed by the appellant, in purported compliance with the act of July 23, 1955 (30 U.S.C. sec. 613(a); Public Law 167-84Cong.) described the Betty mining claim. That claim, situated wholly within the SE$\frac{1}{4}$SW$\frac{1}{4}$ sec. 15 was located on November 2, 1940; it was amended on October 21, 1958 to include additional lands within sec. 15 and the N$\frac{1}{2}$ sec. 22. All the land embraced within the SE$\frac{1}{4}$SW$\frac{1}{4}$ sec. 15 and the NE$\frac{1}{4}$NW$\frac{1}{4}$ sec. 22 was withdrawn for powersite purposes (Powersite Classification #45) on July 7, 1922. The lands were restored to the general public under section 24 of the Federal Power Act on March 5, 1955; however, they were withdrawn for first form reclamation purposes on February 19, 1952. They are now included within that reclamation withdrawal as well as in proposed withdrawal, Sacramento 058318 (filed April 20, 1959), for an administrative site for the Department of Agriculture.

The appellant asserts that since he has made substantial improvements on the property and has performed all required annual assessment work, his mining claim should be recognized.

It is well established that lands withdrawn from disposal under the public land laws, including the mining laws, are not subject to any form of appropriation. Cameron v. United States, 252 U.S. 450 (1912). Thus prior to the passage of the act of August 11, 1955 (30 U.S.C. secs. 621-625; Public Law 359-84C) lands embraced in an existing powersite withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for powersite purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). It follows that the Betty mining location of 1940 was void ab initio.

Section 2(c) of P.L. 359 provides that "Nothing in this act shall affect the validity of withdrawals or reservations for purposes other than power development." Thus, the restoration under section 24 of the Federal Power Act could not serve to subject the land, included within an outstanding reclamation withdrawal, to mining appropriation. Since a location on lands within a first form reclamation withdrawal is without validity, R. J. Walter et al., A-27243 (March 15, 1956), the amended or re-location of the Betty in 1958 cannot serve to validate the previous void location; nor may assessment work or construction of improvements serve to validate a mining location, void from its inception because located on lands not subject to mineral location.

The Land Office decision is affirmed.

Mr. Orebaugh is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Mr. Fred Orebaugh (Certified Mail)
Minerals Staff Officer (5)
Regional Forester (Regular Mail)
Appeals List No. 1
BF

69854-60

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 4 Failure to appeal

Where a mining claimant failed to appeal from an adverse decision within the time allowed by the rules of practice, the appeal must be dismissed.

Where a mining claimant requested a new hearing but failed to submit any evidence to show in what way such hearing might affect or alter the decision previously rendered, the motion for a new hearing will be denied.

United States v. Jean Roe et al., Contest Sacramento 7-365 April 7, 1960

In reply refer to:
Contest
Sacramento 7-365
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 7, 1960

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DECISION

United States,
Contestant

v.

Jean Roe and Clyde Roe,
Contestees

Garland E. Lincoln,
Appellant

Oro Grande Lode Mining Claim
Situated in section 24,
T. 26 S., R. 32 E., M.D.M.,
California

Appeal Dismissed
Motion for a New Hearing Denied

Mr. Lincoln has appealed from a decision, dated April 14, 1952, declaring the Oro Grande Lode Mining Claim null and void for lack of discovery.

The land involved was withdrawn for the Isabella Reservoir and Dam Site Project (Public Land Order #548), on January 26, 1949. Contest proceedings against the claim* initiated in April 1950, charged the land covered by the claim was nonmineral in character and that a valid discovery had not been made within the limits thereof.

At the hearing, conducted April 26, 1951, the Government introduced evidence to show that all the workings on the claim are very old, and in the main it was established that the improvements were all completed long before Mr. and Mrs. Roe acquired the claim. It was shown that the Roes' minor workings failed to uncover any greater values than those previously known to exist and which in over 50 years had failed to disclose ore in such quantity and quality as to justify exploitation. The contestees, although testifying at the hearing, failed to rebut the testimony adduced by the Government except by uncorroborated statements of hopes and beliefs that further operations will disclose greater values. In view of such testimony, and coupled with the testimony of expert witnesses that a vein of commercial value warranting a prudent man in the further expenditure of labor and means, with a reasonable prospect of success, does not exist within the limits of the claim, justifies the conclusion that a valuable mineral deposit does not exist on the claim and that the Oro Grande is invalid for lack of discovery. See Castle v. Womble, 19 L.D. 455 (1894).

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*The contestees, Mr. and Mrs. Roe, were the then owners of the Oro Grande.

The Roes failed to appeal from the decision declaring the mining claim invalid within the time allowed by the rules of practice, and the decision of April 14, 1952, became final. Thereafter, on June 10, 1952, Mr. Lincoln appealed. He stated that he had purchased the claim from the Roes in October 1951. He asserted that the Government had failed to establish the invalidity of the claim and requested a new hearing. A covering letter from his attorney stated:

> "As to the motion for a New Trial, I have taken appropriate steps to obtain from Mr. Lincoln a detailed mining engineering report so that I will have some evidence to report to your office for the Motion for a New Trial. I appreciate that the time setting of a new trial has expired, but I feel that in this case perhaps the Government would waive the strict time limit."

Although stating that an "engineering report" would be forthcoming in support of the motion for a new hearing, no further word in that regard has been heard from the appellant in almost eight years. From this we must assume that he has been unable to furnish any evidence, not previously considered, to show that the claim was known to contain a valuable mineral deposit prior to the withdrawal of 1949 (Cf. Cameron v. United States, 252 U.S. 450, 1920), or that any evidence he could submit would justify any change in the prior adverse decision.

Under the circumstances the appeal is dismissed and the motion for a new hearing is denied.

Mr. Lincoln is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P. O. Box 4291
Sacramento 21, California

Edward Woozley
Director

Enclosure

Distribution on page 3

DISTRIBUTION:

Ned P. Eads, Attorney at Law (Certified Mail)
Mr. Garland E. Lincoln (Regular Mail)
Regional Solicitor (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

appeal to Sec -- 11-25-60
affirmed A-28525 ([illegible] Sac)

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

Where a mining claim is located after August 11, 1955 on land withdrawn for power-site purposes and included within an operating project and has not been restored under section 24 of the Federal Power Act: HELD: The land is not subject to mineral location but is excepted from the general provisions of the Act of August 11, 1955, by reason of the third proviso of section 2 (30 U.S.C. 621a), and the claim so located is null and void.

John Henry Jones et al., ML 176(29.2)(Sacramento) (May 3, 1960)

In reply refer to:
ML 176 (29.2)(Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

May 3, 1960

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DECISION

John Henry Jones
Mary Elizabeth Jones

Act of August 11, 1955 involving the Hetty Jane Placer Mining Claim situated in the NE¼ sec. 34, and the High Hope and Mary Elizabeth Quartz Mining Claims situated in secs. 26 and 27, all in T. 26 N., R. 7 E., M.D.M., California.

Decision Modified; Case Remanded

Mr. and Mrs. Jones have appealed from a decision of November 9, 1959, rejecting their notices of location for the Hetty Jane, High Hope and Mary Elizabeth mining claims. The claims were located in April and May 1959, and filings were made in purported compliance with the act of August 11, 1955 (30 U.S.C. secs. 621-625; Public Law 359-84C).

The lands involved were withdrawn for powersite purposes. They were included in Power Project 179 on May 13, 1927. Part of the land embraced within the Hetty Jane was included in operating Project 2105, effective December 7, 1956, and reserved from all forms of appropriation. Some land in the SE¼SE¼ sec. 27 is also included in Project 2105. The appellants filed their notices of location within 60 days after location.

Prior to the passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). Although the act removed, in the main, power-site withdrawals as a bar to locations made thereafter on lands so withdrawn, it excepted from the act such lands "which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress."

All the lands covered by the Hetty Jane and High Hope claims are included within the powersite withdrawal. Some of the lands within these claims are included within project 2105; as to such lands the act did not change the existing law but specifically excepted them from the provisions of the statute. As to such lands, not restored to entry under section 24 of the Federal Power Act when the claims were located, the Hetty Jane and High Hope are without validity and void; the location certificates are properly rejected to the extent that the claims cover lands within project 2105. However, the certificates are entitled to filing insofar as they cover other lands within the powersite and otherwise subject to location.

The record indicates the Mary Elizabeth covers, in whole or in part, lands withdrawn for powersite purposes; none of the land is included within any operating project. The location notice for that claim, then, was properly filed and should have been accepted for filing to the extent that it covered lands within the powersite.

Therefore, when this decision becomes final, the case record will be returned through the Bureau's State Supervisor at Sacramento for recording to the extent indicated above.

Mr. and Mrs. Jones are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers each claim adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Mr. & Mrs. John H. Jones (Certified Mail)
Minerals Staff Officer (3)
Federal Power Commission, Washington 25, D. C.
Appeals List No. 1
BF

73429 - 60

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to:

Where a mining claim is located after August 11, 1955 on land withdrawn for power-site purposes and included within an operating project and has not been restored under section 24 of the Federal Power Act HELD: The land is not subject to mineral location by reason of the third proviso of section 2 of the act of August 11, 1955, and the claim is null and void.

Meadow Lake Gold, ML-164 (Sacramento) (June 7, 1960)

In reply refer to:
Sacramento, ML-164
5.04g
June 7, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

	:	Aurocobre and Copper King
Meadow Lake Gold, by	:	Lode Mining Claims situated
Aubrey L. Wisker, Manager	:	in secs. 22 and 27 T. 18 N.,
	:	R. 13 E., M.D.M., California

Decision Affirmed

Meadow Lake Gold, by Aubrey L. Wisker, Manager, has appealed from a decision of February 19, 1959, rejecting its location notices for the Aurocobre and Copper King Lode mining claims. The location notices were filed in purported compliance with the act of August 11, 1955 (30 U.S.C. secs. 621-625). They were rejected for the reason that the lands within the $N\frac{1}{2}NE\frac{1}{4}$ sec. 27 were withdrawn and included in power project #889, an operating project licensed September 24, 1930, to the Pacific Gas and Electric Company.

No error is assigned to the Manager's decision. The appeal is merely a recitation to the effect that mining on the subject claims would not adversely affect the purposes for which the land was withdrawn.

Prior to the passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to the act, is null and void where land embraced in the claim had not been restored to entry under section 24, of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145, (1958). Although the act removed, in the main, power-site withdrawals as a bar to locations made thereafter on lands so withdrawn, it excepted from the act such lands "which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress." (3rd. proviso sec. 2; 30 U.S.C. sec. 621(a))

The land covered by these claims in sec. 27 was withdrawn for power-site purposes; it is included within an operating project under a license issued by the Federal Power Commission. As to it the act did not change the existing law but specifically excepted it from the provisions of the statute.

Therefore, since the land was not restored to entry under section 24 of the Federal Power Act on dates of location, September 9 and 10, 1958, the Aurocobre and Copper King mining claims are null and void insofar as they cover lands in the $N\frac{1}{2}NE\frac{1}{4}$ sec. 27.

This decision is without prejudice to the appellant petitioning the Federal Power Commission for restoration of the land under the aforesaid section 24; if restored the land will then be subject to mineral location. See 43 CFR Part 103.

The appellant herein is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $10. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Aubrey L. Wisker (Certified Mail)
Minerals Staff Officer (5)
Federal Power Commission (2)
Appeals List No. 1
BF

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

A mining claim located on land withdrawn for powersite purposes and not restored under section 24 of the Federal Power Act is null and void where such location was made prior to the act of August 11, 1955.

Gerta Heinzel and Ted Heinzel, Sacramento, S-7073 (June 8, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

S-7073 (Sacramento)
5.04g

June 8, 1960

Certified Mail
Return Receipt Requested

DECISION

Gerta Heinzel and
Ted Heinzel

King Snake Lode Mining Claim
situated in the NE¼ sec. 18,
T. 32 N., R. 6 W., M.D.M.,
California.

Decision Affirmed

Mr. and Mrs. Heinzel have appealed from a Land Office decision of July 9, 1959, declaring the King Shake Lode Mining Claim null and void. The claim was declared invalid for the reason that it was located on July 17, 1945, on lands withdrawn for Power Project No. 247 on March 2, 1923. The record does not indicate that the land involved was restored to entry under section 24 of the Federal Power Act.

The appellants allege no error in the decision appealed from; the appeal, in effect, is a prayer for relief.

The Department has consistently held that prior to the passage of the act of August 11, 1955 (30 U.S.C. sec. 621 et seq.), land embraced in power site withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes but prior to passage of the act of August 11, 1955, is null and void unless the land embraced in the claim was restored to entry under section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). It follows that the mining claim, located when the land covered thereby was not subject to appropriation under the mining laws, is null and void ab initio.

The Land Office decision is affirmed.

Mr. and Mrs. Heinzel are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. and Mrs. Ted Heinzel (Certified Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

appeal to Sec. affirmed in part vacated in part A 28597 5-18-62

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

* 1 Generally: Public Law 359-84C

A notice of location filed in purported compliance with P.L. 359 is properly rejected to the extent that it covers an invalid claim.

Although P. L. 359 removed, in the main, power site withdrawals as a bar to locations thereafter made on lands withdrawn for power site purposes it excepted lands also withdrawn for other purposes (1st form reclamation withdrawal) and lands included in any project licensed by the Federal Power Commission where the lands are not restored subject to section 24 of the Federal Power Act. (30 U.S.C. sec. 621(a) and (c)).

Francis N. Dlouhy, M.L. 79, 80, 83 through 88 (Los Angeles) / (June 22, 1960)

RECEIVED
JUL 5 1960
Dept. of the Interior
Bur. of Land Mgmt.
State Office
[illegible]

In reply refer to:

ML 79, 80, 83 through 88
5.04g

June 22, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

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DECISION

Francis N. Dlouhy : Act of August 11, 1955.
: Columbium Defilee, Mangano-Tung
: Defilee, Tungsten Defilee, Golduragar,
: Uracolmag, Golduramar Bealir Tugati
: Vanicobman, Uraloxvan, and
: Aurobisberyl Placer Mining Claims
: All situated in secs. 22, 26 through
: 30, T. 12 S., R. 27 E., M.D.M., Calif.
:

Decisions Affirmed

Mr. Dlouhy has appealed from decisions of December 9, and 30, 1959, rejecting in whole or in part, copies of location notices filed in purported compliance with the act of August 11, 1955 (30 U.S.C., secs. 621-625; Public Law 359, 84th Cong. and declaring all or portions of the above-identified mining claims null and void. The decisions were premised on the fact that all or portions of the claims when located in October and November 1959, cover lands embraced in a First Form Reclamation Withdrawal, of February 29, 1952 1/ in preliminary permit for Project #1990 issued under the Federal Power Act. The preliminary permit has been superseded by an application for an operating license, which application is still pending.

The appellant does not allege any error in the decision appealed from. His appeals merely set forth reasons why he believes the reclamation withdrawal should be lifted, and why the mining claims do not interfere with the permit or pending application for a license under the Federal Power Act. His appeals are, in fact, petitions that his claims be allowed to stand.

Prior to the passage of the act of August 11, 1955, lands embraced in an existing powersite withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for powersite purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal

---

1/ Effective upon filing with the Federal Register on March 3, 1952. See Associate Solicitor's Opinion, M-36382 (October 24, 1956).

Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). Although the act removed, in the main, powersite withdrawals as a bar to locations made thereafter on lands so withdrawn, it excepted from the act such lands "which are included in any project operating or being constructed under a license or permit issued under the Federal Power Act or other Act of Congress" (sec. 2(a), third proviso). Section 2(c) provides that - "Nothing in this act shall affect the validity of withdrawals or reservations for purposes other than power development." It follows, that lands within a project licensed by the Federal Power Commission and not restored under section 24 are not subject to location even after the enactment of Public Law 359. And lands within first form reclamation withdrawals are not subject to location unless otherwise opened to entry. R. J. Walter et al., A-27243 (March 15, 1956).

It follows that the mining claims are void insofar as they conflict with permit #1990 (and even though the appellant is the holder thereof) and cover lands within the reclamation withdrawal. It was, therefore, correct and proper to declare the claims void to the extent indicated[2] and to reject for filing the location certificates insofar as the mining claims were shown to be void.

The Land Office decisions are affirmed.

This decision does not preclude the appellant from petitioning for restoration of lands within the reclamation withdrawal and under section 24 of the Federal Power Act. If the lands are restored to mining appropriation, he may then, all else being regular, locate mining claims on the subject lands.

Mr. Dlouhy is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be computed on the basis of $5.00 for each mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $40.00. In taking an appeal there must be strict compliance with the regulations.

Earl Thomas
Acting Director

Enclosure
DISTRIBUTION:
Mr. Francis N. Dlouhy (Certified Mail)
Regional Forester
Federal Power Commission
Minerals Staff Officer (5)
Appeals List No. 1
BF

2/ And including that land covered by the Uraloxvan described as the NW¼SW¼ sec. 29, T. 12 S., R. 27 E., M.D.M., California.

appeal to Sec
affirmed in Part
Reversed in Part

A-28557
3-27-62

DOCKET FILES

MINING CLAIMS * 5 Discovery
* 6 Lands Subject to (Building Stone Act, 30 U.S.C. sec. 161)

In order that a building stone placer be valid - 1. The stone must be of commercial quality and quantity for building purposes and distinguishable from common stone not used for building purposes, 2. Each 10 acre subdivision must be "chiefly valuable for building stone," 3. The deposit must be such that it can be mined, removed and marketed at a profit. Unless all three of these elements are established a claim located under the Building Stone Act is null and void.

United States v. Alfred and Edna W. Coleman, Contest 6833 (Los Angeles)

(June 22,1960)

In reply refer to:

Contest 6833 (Los Angeles)
Los Angeles 0137951
(Mineral Patent Application)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Jun 22, 1960

Certified Mail
Return Receipt Requested

DECISION

United States, Contestant	:	Baldwin Lake Quarry Claims Nos. 1, and 4 through 20 situated within Secs. 1, 2 and 12, T. 2 N., R. 1 E., and Secs. 6 and 7, T. 2 N., R. 2 E., S.B.M., California
v.	:	
Alfred and Edna W. Coleman, Contestees	:	

Decision Modified
Case Remanded

Contest proceedings, No. 6833, were initiated upon the protest of the Forest Service, against the mining claims identified above, listed in mineral patent application, Sacramento 0137951. The complaint charged that (1) the lands within the claims are nonmineral in character, (2) minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery and (3) $500 has not been expended on Baldwin Lake Quarry Claims Nos. 7, 9, and 11 through 19. After a hearing the Hearing Examiner, by decision of December 18, 1958, found that the Nos. 1, 4, 5, 8 and 10 claims had been validated by discovery; he declared the remaining claims to be invalid. Mr. and Mrs. Coleman have appealed from the finding of invalidity; the Forest Service has appealed from that part of the decision which held the five claims valid.

The Forest Service asserts that a valid discovery on any of the claims was not demonstrated prior to July 23, 1955, and that all the claims are invalid. The contestees contend that each and every claim was validated by discovery. Arguments of the parties were also presented concerning the third charge, i.e., the $500 worth of labor required to be expended or improvements made upon the claims to qualify for patent (30 U.S.C. sec. 29).

The Baldwin claims were located on various dates in 1949, 1951 and 1952, for the valuable deposit of Saragossa quartzite alleged to be contained therein. They are within the San Bernardino National Forest; they cover 720 acres and are traversed by California State Highway No. 18 for approximately 11,920 feet (about 24 acres). The lands comprise approximately 1/40th of the quartzite deposits in the Baldwin Lake area (Tr. 39). In a supplement to the patent application the contestees stated "This is a rock quarry, not a gold mine. A representative of the Government will find it impossible to take two steps in any direction of the compass, on any one of the claims, without walking over quartzite, the mineral claimed in the Patent Application. There can be no difficulty in determining the existence of the mineral claimed. Please refer to Special Report No. 31, geology of Johnston grade area, California Bureau of Mines; this report included as part of patent application. The whole mountain is the point of discovery. * * * We are dealing with placer rock claims under quarry law. There is no valuable timber on these claims. * * *" The publication referred to states the quartzite may be over 1000 feet thick.

The attorney for the contestant stated that "there are possibilities on these claims because of the scenic features for the location of a park in certain areas, and they also have in them various recreational features which would make them desirable for other purposes" (Tr. 75), but no evidence was presented as to the value of the lands in the claims for recreational, park or other purposes. The words "lands chiefly valuable" in the act of 1892 imply that the test for determining whether the lands may be entered under the placer mining laws is a comparison of their building stone values with their value for other purposes. That has been the test applied by the Department in determining whether "lands chiefly valuable for stone" could be entered under the timber and stone act of June 3, 1878 (20 Stat. 89; 43 U.S.C. 313), section 2 of which was amended by the act of 1892. See City of Tucson v. Dodson, 52 L.D. 36; Narver v. Eastman, 34 L.D. 123; Ada B. Millican, 43 L.D. 553. Applying the comparative value test to the lands within these claims, as no evidence has been presented that the lands have value for recreational or other nonmining purposes exceeding the values of the lands for their building stone, it must be conceded that the lands are "chiefly valuable" for their building stone. But conceding that the lands are chiefly valuable for the building stone deposits as contrasted with any other values the lands may have, does not dispense with the necessity for the defendant to establish that a discovery on each claim has been made sufficient to validate it and to that end establish that the particular deposit on each is a valuable one because of its suitability for building purposes, its accessibility and the existence of a present demand therefor and hence can be marketed profitably. See Estate of Victor E. Hanny, A-26280 (1952) unreported; Departmental instructions of August 29, 1896 (23 L.D. 322). We now turn to the question whether each of the claims contains a valid discovery.

The deposits of stone on the 720 acres in the claims are part of approximately 28,000 acres of similar stone (tr. 38, 39) on ridges extending from Gold Mountain, which, according to Sanborn, a qualified mining engineer testifying for the contestant, for many years "have been used locally and to some extent somewhat distant from the area for fireplaces, rock walls, and to a very limited extent for veneer-type of construction." (Tr. 22). He said that the stone is extremely tough, does not shape with ease and when broken breaks in a way not predictable, and consequently the market for the stone is limited and no appreciable increase in sale could be expected (Tr. 39). Hence he was of the opinion that a prudent man would not be justified in spending time and money with a reasonable chance of success. But he said that an examination of sale receipts which Mr. Coleman made available to him indicated that since the claims were located in excess of $12,000.00 worth of stone was disposed of in the interim between the dates of locations and the filing of the patent application (Tr. 23). He testified further that from January, 1957, to the date of his examination of the claims, sales amount roughly to $1,025. (Tr. 23). Another witness for the contestant, Burman, Southern Division Manager of the Western State Stone Company, primarily a marketer, producer and distributor of natural stone products, testified that masons were somewhat adverse to using the stone because it dulled their tools although it is susceptible to cutting down and shaping; and that so far as he knew no stone from the claims was presently being sold (Tr. 54, 55, 56). However, he stated that the stone was adaptable to mass construction techniques, that the market for stone "goes in cycles" and that other types of stone were presently enjoying the most popularity (Tr. 58).

Each claim is abundantly endowed with rock deposits. The contestees, during the 10 year period since the location of the mining claims built a home, shop, and other facilities necessarily incident to their mining activities and have graded roads within the claims. Concerning individual claims it was shown that the home and other facilities were constructed on claim No. 1; approximately $1,500 worth of stone has been sold from that claim. Materials in the value of about $8,000 has been sold from claim No. 5; about $1,080 from claim No. 8 and about $1,500 from claim No. 10. Sales to the total amount of approximately $350 were made from claim No. 4; no sales or sales in lesser amounts were made from the remainder of the claims.

Mr. McClellan, testifying in behalf of the contestees, showed that he had entered into a lease agreement with Mr. Coleman. The lease, executed May 17, 1958, permitted operations looking to the sale and disposal of any materials on the claims, excepting building stone. Operations under the lease have been almost exclusively restricted to claim No. 10.

The Government witnesses, in view of the cost and value of the improvements, the income from sales, the demand or lack thereof in neighboring and distant localities, were of the opinion that a better market than that already portrayed by the contestees could not be developed and that a prudent man would not be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a paying mine from any of the claims.

The opinions and contentions of the contestees concerning the value of the rock for which the claims were located are cogently presented in statements of Mr. McClellan appearing in Tr. 80 and 82. They follow:

> "But we expect, in our little operation up there, an annual sales volume of not less than $25,000 per year. At the present time it proves that there is some value to the property, because we have four families who are deriving their living and livelihood from that property, so there must be some values there.
>
> * * *
>
> "During the months of July, August and first part of September, our sales of these products are in excess of $4,000, just in those two and a half months. We sold slightly over $2,000 worth in the month of July. We sold $1,500 in the month of August, and our sales so far this month are approximately a thousand dollars.
>
> "As I stated before, we expect our annual sales to be in the neighborhood of $25,000, and that will be a variety of products, from building stone, which we will take off in our classifying process, on down through sand and gravel."

Although the record is replete with testimony concerning the value of development work, that evidence is not deemed necessary to a decision in this case.

On the basis of the evidence presented, the Hearing Examiner held the Nos. 1, 4, 5, 8, and 10 claims had been validated by discovery in that the stone from the claim was shown to be marketable prior to the passage of the act of July 23, 1955 (30 U.S.C. sec. 611 et seq.); he found the remaining claims null and void.

It is clear from the patent application and evidence submitted at the hearing, that the Baldwin Lake Quarry Claims were located solely for the building stone therein contained under the act of August 4, 1892 (30 U.S.C. sec. 161).

The act of August 4, 1892, provides in material part as follows:

> "Any person authorized to enter lands under the mining laws for the United States may enter lands that are chiefly valuable for

> building stone under the provisions of the law in relation to placer-mineral lands. * * *"

In order to establish a valid building-stone mining location, the land must be chiefly valuable for building stone and one must discover within the limits of the claim a deposit of stone which is of such quantity and quality that a man of ordinary prudence would be justified in the expenditure of his time and means in an effort to develop a paying mine. Estate of Victor E. Hanny, A-26280 (March 5, 1952); 63 I.D. 369 (1956); A-27362 (September 24, 1957). Of course, under the mining laws (30 U.S.C. secs. 21 and 22) only "valuable mineral deposits" may be located. These laws have been construed to mean that if a deposit in land does not render its extraction profitable and justify expenditures to that end, it is not a valuable mineral deposit. Cameron v. United States, 252 U.S. 450 (1920); Chrisman v. Miller, 197 U.S. 313 (1905). In applying this rule to materials of widespread occurrence it has been held that a valid discovery is established only if it is shown that the materials can be extracted, removed and marketed at a profit. United States v. Everett Foster et al., 65 I.D. 1 (1958); Everett Foster et al. v. Fred A. Seaton, etc., No. 14953 in the United States Court of Appeals, D.C. (October 22, 1959), 271 F.2d 836.

It is required under building stone location that each 10 acre subdivision of the claim be "chiefly valuable" for the stone. See Ferrell et al. v. Hope, 29 L.D. 12 (1899) and American Smelting and Refining Company, 39 L.D. 299 (1910).

There are three elements essential to the validity of a building stone placer. 1. The stone must be a "valuable mineral deposit," i.e., it must be of commercial quality and quantity peculiarly useful to the building trade and distinguishable from common stone not used for such purposes. 2. The lands located must be "chiefly valuable for building stone." 3. The deposit must be such that it can be mined, removed and marketed at a profit. Unless all three of these elements are established a claim located under the Building Stone Act is null and void.

Conceding that the stone on the claims is suitable for building purposes to some extent, in view of the immense quantities of similar stone over widespread areas outside of the claims, the stone on them must be held to be a "common variety" as defined in the act of July 23, 1955 (30 U.S.C. 611, et seq.) since the stone possesses no "property giving it distinct and special value" which would distinguish it from the stone on surrounding and nearby areas. But as these claims were located before that act they do not come under it and hence the criterion for determining whether each contains a valid discovery depends upon whether notwithstanding the immense quantities of similar stone the deposit on any particular claim is a valuable one.

Baldwin Lake is a playa lake of intermittent boundaries, about two miles from Big Bear City. The elevation of the lake floor is about 6700 feet.

The westerly shore is embraced within the claims at about the 6750 feet level, and climbs very rapidly to over 7000 feet. Highway 18 is at the 6750 feet level as it traverses sec. 7. By reference to contestant's exhibit #2, a Geological Survey map of the area (survey of 1946) and a plat of the mining claims, it is evident that portions of the Nos. 1, 10 and 20 claims extend beyond the banks and onto the lake floor. The Nos. 1, 10, 5 and 8 claims are traversed and readily accessible from the state highway.

Bearing this in mind we note that the bulk of stone removed and sold is from the Nos. 1, 5, 8 and 10 claims and the stone on those claims are sufficient to satisfy the market. The stone sold from the other claims appears to have been loaded on trucks only as an incident to road grading operations and sold from a central point on claims nos. 1 or 10. The record also indicates that prospective purchasers could not or would not travel very far off the main road to select stone from claims other than the nos. 1, 5, 8 and 10 and stone from those claims was not and is not in demand.

It appears from the evidence that probably much of the stone on Claims Nos. 4, 6, 7, 9, and 11 through 20 could be used for building purposes. But in view of the large quantities of similar stone in the area and considering the fact that little or no stone has been marketed from them during the approximately 10 years since they were located, the conclusion is warranted that the deposit on each lacks one of the elements essential to give it value, namely the existence of a demand for the stone on that claim. The evidence disclosed no demand for the type of stone on those claims in excess of the intermittent demand that has lead to the marketing of some of the stone found on claims Nos. 1, 5, 8 and 10 at irregular intervals during the 10 years. Lacking demand therefor, the deposits on the other claims are not marketable and hence are not valuable deposits which would support placer locations, as under the United States mining laws the discovery of a valuable deposit of mineral is a prerequisite to the validity of the location. Neither can any presently foreseeable future value that the deposits may acquire through the arising of a demand therefor, validate the locations, as the stone is a common variety which after the act of July 23, 1955, supra, could not be acquired by locations made before the act for deposits then valueless but which acquire value after the act. See United States v. P. D. Proctor et al., A-27899 (May 4, 1959); United States v. G. C. Mulkern, A-27746 (January 19, 1959).

Since the 10 acre areas embraced within the claim No. 10 described as the SW$\frac{1}{4}$SE$\frac{1}{4}$NW$\frac{1}{4}$ and the NW$\frac{1}{4}$SW$\frac{1}{4}$NE$\frac{1}{4}$ sec. 7 (both areas extend beyond the bank of the lake and on to the playa floor), have not been quarried, and stone therefrom has not been in demand, we believe that these 10 acre subdivisions were not chiefly valuable for the mineral deposits of stone alleged to be contained therein at time of location or at any time since; claim No. 10, to the extent of the two described subdivisions is, therefore, invalid.

We turn now to the remaining claims, i.e., the Nos. 1, 5, 8 and that portion of the No. 10 described as the N½SE¼NW¼ sec. 7, to determine whether those claims were validated by discovery, i.e., whether the deposits were able to be mined, removed and marketed at a profit prior to July 23, 1955, and may be profitably marketed today.

The record shows that stone has been removed and marketed from those claims ever since their location in 1949. Income from past sales has just about equalled the cost and value of improvements without allowance for any recompense to Mr. Coleman for his own labor. Be that as it may, it is good accounting procedure to amortize the cost of permanent improvements over a long period of time; current and/or future expenditures for maintenance will be far less than the initial costs. Under such circumstances, continued sales, even at the rate shown for the first ten years of operations have and will result in a livelihood to Mr. Coleman; he will realize a profit from operations over and above the value of his own labor. It matters not that the stone operations may not sustain a mammoth operation by a large company; it is sufficient that a prudent man be justified in expending labor and means with a reasonable prospect of success in developing a paying mine. Since a continuing and steady market, albeit not expanding, is shown to exist, and marketability of the product at a profit (even though not a great one) is shown, discovery within the meaning of the mining laws, all else being regular, is established. This is so even though it is necessary to disregard any considerations concerning the profit from the sand and gravel operations (initiated after the act of July 23, 1955), undertaken by Mr. McClellan in 1958.

The Hearing Examiner found that limited quantities of stone have been marketed at a profit ever since 1949 and that operations are maintained at a profit. The evidence fully supports such finding. Therefore, since the lands within the Baldwin Lake Quarry Claims Nos. 1, 5, 8 and the portion of No. 10 described as the N½SE¼NW¼ sec. 7 are also shown to contain valuable mineral deposits of building stone on lands which when located were chiefly valuable for such stone, these mining claims, to the extent indicated, have been validated by discovery. All else being regular, the patent application for these mining claims (to the extent indicated) shall be processed to patent.

The Hearing Examiner's decision is modified as above.

Mr. and Mrs. Coleman and the Forest Service are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. A $5.00 filing fee must be submitted for each separate mining claim included in the appeal. In taking an appeal there must be strict compliance with the regulations.

In the event of appeal by the contestees, the adverse party to be served is:

Office of the General Counsel
U. S. Department of Agriculture
212 Federal Office Building
San Francisco 2, California

In the event of appeal by the Forest Service, the adverse party to be served is:

Mr. Alfred Coleman
P. O. Box 322
Big Bear City, California

Earl D. Thomas
Acting Director

Enclosure

DISTRIBUTION:

Mr. Alfred Coleman (Certified Mail)
Office of the General Counsel (Certified Mail)
Hon. Harry R. Sheppard, House of Representatives
Hearings Administrative Officer
Mr. Rawleigh L. Tremain, U.S.D.A.
Mr. John Sieker, Forest Service, U.S.D.A. (8)
Minerals Staff Officer (3)
Appeals List No. 1
BF

MINING CLAIMS * 6 Lands Subject to

Lands within a power site withdrawal were not open to the location of mining claims until the adoption of the act of August 11, 1955, and any attempted location before that time subsequent to the withdrawal of the land for power site purposes is null and void, unless the lands embraced in the claim had been restored to entry under sec. 24 of the Federal Power Act at the time of location.

Clovis M. Laidet, Sacramento 055221 (June 29, 1960)

In reply refer to:
Sacramento 055221
5.04g
June 29, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
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DECISION

Clovis M. Laidet : North Star Lode Mining Claim
: Situated in the SW$\frac{1}{4}$, sec. 29,
: T. 6 N., R. 14 E., M.D.M.,
: California.

Decision Affirmed

Mr. Laidet has appealed from a decision of November 9, 1959, rejecting mineral patent applicatinn, Sacramento 055221, insofar as it described the North Star Lode mining claim, and declaring that claim null and void *ab initio*. The decision recited that the land "is included in temporary withdrawal for Power Site Reserve #87 effective December 29, 1909, and made permanent August 11, 1910. These lands were therefore not open to mineral location on August 10, 1932, the date of the original location of the North Star Lode."

The appellant asserts that the Secretary of the Interior had no authority, prior to the act of June 25, 1910 (43 U.S.C., sec. 141) and the act of June 10, 1920 (16 U.S.C. sec. 791a *et seq.*) to withdraw the subject land from mineral location for a powersite reserve, that the withdrawal of 1909, is ineffective because of lack of authority to effect the withdrawal, and that the location of 1932 was made upon land then subject to location under the mining laws.

Withdrawals for power site purposes made prior to the act of June 25, 1910, 43 U.S.C., sec. 141 as amended, were effective to preclude mining locations on the land. See *U.S.* v. *Midwest Oil Co.*, 236 U.S. 459 (1912). The 1910 act stated in part that lands withdrawn under its provisions "shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas and phosphates." By the act of August 24, 1912 (37 Stat. 497) locations for metalliferous minerals were permitted. During the period from August 24, 1912 to the enactment of section 24 of the Federal Power Act of June 10, 1920, 16 U.S.C., sec. 818, power-site reserves established under the 1910 act as amended by the 1912 act were not thereby closed to metalliferous mining locations.

From June 10, 1920 until the enactment of the Mining Claims Restoration Act of August 11, 1955 (30 U.S.C. secs. 621-625) lands embraced in powersite withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for powersite purposes, but prior to the passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location. Harry A. Schultz et al., 61 I.D. 259 (1953); Day Mines, Inc., 65 I.D. 145 (1958) It is pointed out that sec. 24 of the Federal Power Act itself prohibits the location of mining claims by providing that:

> "Any lands of the United States included in any proposed project * * * shall * * * be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Whenever the commission shall determine that the value of any lands * * * will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open * * * under such restrictions as the Commission may determine * * *."

The land covered by the North Star, included in the temporary withdrawal of 1909, was also included in the withdrawal by Executive Order of July 2, 1910 for powersite purposes. The July 2, withdrawal was promulgated under the 1910 act. Since the land had not been restored under section 24 of the Federal Power Act, the land covered thereby was not subject to location in 1932, and the purported location of that date is a nullity.

The Land Office decision is affirmed.

Mr. Laidet is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations of 43 CFR, Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal, there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure
DISTRIBUTION:
Gilmore & Gilmore, Attorneys at Law (Certified Mail)
Clovis M. Laidet (Regular Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

appeal to Sec
Reversed & Remanded
A-28611 7-6-61

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 1 Generally
* 5 Government Contests

Where a contestee answers a complaint but does not specifically meet and respond to the allegation that a mining claim is invalid for want of discovery, the allegations of the complaint must be taken as confessed and the claim declared null and void.

United States v. M. V. Browning et al., Contest Nos. 10-18 and 10-26 (Sacramento)

(June 30, 1960)

In reply refer to:
Contest Nos. 10-18 and 10-26
(Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

June 30, 1960

Certified Mail
Return Receipt Requested

DECISION

United States	:	
v.	:	
M. V. Browning, Administrator of the Estate of O. W. Browning, deceased	:	Canady Hill No. 1 Lode Claim, Sun Set Nos. 1-4 Quartz Mining Claims
Edna A. Browning et al.	:	

Decisions Affirmed

Mr. Browning has appealed from separate Land Office decisions of October 12, 1959, declaring null and void the above-identified mining claims.

The mining claims involved were subject of contest proceedings Nos. 10-18 and 10-26 in which complaints had been served on the contestees. In pertinent part, the complaints charged that minerals had not been found within the limits of the claims in sufficient quantities to constitute valid discoveries. Answers filed in the proceedings each contained the identical statement that "Having no knowledge of the allegations in paragraph 3 of the complaint, contestee neither admits nor denies but demands proof thereof." The Manager, similarly as in the Bureau decision of June 1, 1959 (Contest 10-16 etc., affirmed on other grounds, A-28182 on April 14, 1960), involving the same parties, found that the answers did not specifically meet and respond to the allegations of the complaints; he took the charges of non-discovery as confessed and declared the claims invalid.

The appellant asserts the "finding that the answer filed did not specifically meet and respond to the allegations in the complaint was erroneous, in that each and every material allegation in the complaint was either denied, admitted, qualified or explained, with the sole intention of joining issue with the Bureau on said allegations and still relying upon a hearing in which they had to carry the burden of proof."

By statute, 30 U.S.C. sec. 23, "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." This means that in the absence of a valid discovery a location of a mining claim is ineffective against the Government and is null and void. See Cole v. Ralph, 252 U.S. 286 (1920).

From the above it is clear that a valid discovery is the basis of the location of a mining claim. As the owner of a mining claim, the appellant must be presumed to know the nature and quality of the discovery serving as the legal basis of his location. When called upon he should be in the position to demonstrate his discovery. And when the validity of his mining claim is challenged by the Government it is incumbent upon the mining claimant to establish that he has fully complied with the mining law - that he has made a valid discovery within the limits of his claim. Foster v. Seaton, 271 F 2d 836 (1959) and cases therein cited.

Where the validity of a mining claim is challenged in a contest proceeding, then-

> "Within 30 days after service of the complaint * * * the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint * * *". (43 CFR 221.64).
>
> "If an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing." (43 CFR 221.65).

Even if acceptable as a general denial in an legal action within the jurisdiction of the appellant's residence the answer is unacceptable here since there is no compliance with the pertinent regulation 43 CFR 221.64 supra. At most the answer is a denial based not on "knowledge" but upon "belief". The mining claimant must establish the verity of his denial and the validity of the mining claim; the Government need not establish the invalidity of the claim by furnishing "proof thereof". The appellant's expression of lack of knowledge is equivalent and tantamount to an admission that no discovery had been made and/or that he has no knowledge whether or not a discovery has been made.

The answer failed in "specifically meeting and responding to the allegations of the complaint" and did not deny the charges therein as required by the rules of practice. Therefore, the Manager was required to take the charges as confessed and render decision accordingly.

It is understandable that one who has but recently acquired ownership of mining interests by inheritance (or other involuntary succession) may require a reasonable period of time to verify the discovery of his predecessor in interest. In such case a reasonable period of time would be granted (upon request) to enable the mining claimant to obtain the necessary information. But where the mining claimant, the contestee, does not request an extension of time but files an answer, the answer will be accepted and the contestee is bound by his answer upon which he must stand.

The Manager's decision is affirmed.

Mr. Browning is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5.00 for each mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee will be $25.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal, the adverse party to be served is:

Regional Solicitor
Department of the Interior
Sacramento 21, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. M. V. Browning (Certified Mail)
Regional Solicitor
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
BF

75105060

MINING CLAIMS * 1 Generally
Act of August 11, 1955 (30 U.S.C., secs. 621-625)

Mining claims located on lands which are later withdrawn or reserved for power purposes are forfeited and properly declared null and void if the mining claimant does not file the notice of location required by section 4 of the act of August 11, 1955, within the time required by the act.

United States v. Edward M. Sorenson, et al., Sacramento 10-10 etc.
(July 8, 1960)

In reply refer to:
Sacramento 10-10 etc.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 8, 1960

DECISION

United States
v. : Mining Claims
Edward M. Sorenson et al.

Decisions Affirmed

Mr. Sorenson and other mining claimants have appealed from Land Office decisions declaring null and void their respective mining claims listed in the attached appendix. The mining claims were declared invalid because the claimants had not filed location notices in the land office within one year from August 11, 1955, as required by the act of August 11, 1955 (30 U.S.C., 1958 ed., secs. 621-625).

The act provides that public lands withdrawn or reserved for power development or power sites shall be open for the location and patenting of mining claims under specified conditions. Section 4 of the act (supra, sec. 623), requires, inter alia, that the owner of any unpatented mining claim on lands withdrawn or reserved for power purposes shall file for record in the United States district land office of the land district in which the claim is situated, within one year after August 11, 1955, as to any locations made before that date, a copy of the notice of location of the claim. The decisions appealed from identified and gave the withdrawal dates of the several different power projects and power sites covering the lands included within the unpatented mining claims here involved. Each of the claims was located before August 11, 1955, and before withdrawal of the lands for power purposes. The decisions stated that the Land Office records failed to indicate that the owners of these claims filed notices of their location within one year from August 11, 1955, and held that the claims were forfeited and null and void on the basis of the Solicitor's Opinion of October 30, 1957 (64 I.D. 393), construing section 4 of the act of August 11, 1955.

The Solicitor's Opinion of October 30, 1957 (supra), held that under section 4 of the act of August 11, 1955, it is necessary for the owner of a claim located prior to a withdrawal for power purposes to file a copy of his location notice in the Land Office for record within one year after enactment of the act of August 11, 1955, and that failure to file as required results in a forfeiture of the claim. The departmental decisions, Jennie Ross Cassity Banks, A-27996 (August 4, 1959), and United States v. M. V. Browning, Administrator, A-28182 (April 14, 1960), held that a mining claim is properly declared null and void for failure of the claimant fo file a copy of his location notice in accordance with section 4 of the act of August 11, 1955, even though the claim was located before the land covered thereby was included in a powersite reserve.

There is nothing in the appeal records before us which provide a basis for distinguishing the cases involved in this decision from the Banks or Browning cases.

The Land Office decisions are affirmed.

Case records Sacramento 10-246, 10-390, S-2989 are returned to the Land Office Manager, Sacramento, California, through the Bureau's State Supervisor, for such further action as may be indicated concerning all or portions of mining claims listed therein which are not covered by this decision.

The appellants herein are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

DISTRIBUTION:

All Claimants Listed In Appendix (Regular Mail)
Wells, Murphey & Coffey, Attorneys (Sacramento 10-10)
J. J. Quill, Attorney (Sacramento 10-40)
Gilmore & Gilmore (Sacramento 10-246, S-712, S-2041, S-2714, S-5265)
Robert A. Tarver, Attorney (Sacramento 10-264, 265, 266. 275)
Edward R. Solinsky, Attorney (Sacramento 10-343, 10-382)
Edwin J. Regan, Regan & Kennedy, Attorneys (Sacramento S-374)
Daniel S. Carlton, Attorney (Sacramento S-1530)
Mr. John Sieker, Forest Service, U.S.D.A., Washington 25, D. C.
SS - California
LO - Sacramento
Minerals Staff Officer (5)
Bureau of Reclamation (10)
Hearings Administrative Officer
Appeals List No. 1
BF

APPENDIX

Land Office File Number	Mining Claimants	Mining Claims Declared Null and Void
Sacramento:		
10-10	Edward Sorenson Karen K. Sorenson Robert B. McMullen Soren Sorenson	China Bar Placer Mining Claim
10-40	William B. Addiego Harry J. Love	Revival Placer Mining Claim Revival Placer Mining Claim (2 claims)
10-246 S-712 S-2041 S-2714	Elvin Van Ness Lester Van Ness Elbert Van Ness	Surprise Extension Lode Claim Misltoe Lode Mining Claim Josephine Lode Mining Claim (Amended Location) Five Pines Lode Surprise Lode Claim Emma Quartz Mining Claim
10-264 10-265 10-266 10-275	Paul L. Grange, Administrator of the Estate of L. A. Grange, deceased Anna B. Toscano Erma Y. Neal Edna Grant Shuey	Inspiration No. 1 Placer Mining Claim Lion Placer Mining Claim Brown Bear Placer Mining Claim Black Oak, Minersville, Harwood, Boarding House, Sun Rise, Red Hill and Shady Gulch Placer Mining Claims
10-343 10-382	Wendell J. Phillips Dorothy E. Wall Russell N. Phillips Floyd E. Phillips Marjorie H. Briggs	Lynch Bar and New Confidence Mining Claims Excelsior Placer Mining Claim
10-390 (Certified)	Folande L. Charpiot	Beaudry Quartz Mining Claim
S-374	Clarence E. Carr	White Rose Placer Mining Claim
S-1420 (Certified)	Margaret L. Ellery	Last Chance Placer Mining Claim
S-1530	John F. Nielson	Harem Placer Mining Claim
S-2456 (Certified)	M. V. Browning Fred R. Giddings Carl J. Giddings Nahum J. Giddings (cont.)	No Name Placer Mining Claim

APPENDIX
(cont.)

Land Office File Number	Mining Claimants	Mining Claims Declared Null and Void
Sacramento		
S-2456 (cont'd)	Ada B. Stary Harold B. Johnson Herbert L. Johnson Henrietta May Gettle Clarence H. Johnson Delia G. Petherick	No Name Placer Mining Claim (cont'd)
S-2989 (Certified)	Herbert S. Blakemore, Individually and as Attorney in fact for Herbert H. Blakemore, Barry E. Froman, and Margaretta Maker	Little Papoose Placer Mining Claim (in part)
S-5265	Lorraine Shull Albert V. Phillips Wendell J. Phillips June Rokoszewski Margaret Weymouth	Short Bend Placer Mining Claim

appeal to Sec
affirmed A-28610 - 7-17-62

MINING CLAIMS * 5 Discovery

To satisfy the requirements of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where claimants fail to make that showing the claim is properly declared null and void.

United States v. Mary V. Chamberlin, Contest 6845 (Los Angeles) (July 8, 1960)

In reply refer to:

(Los Angeles) Contest 6845
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 8, 1960

Certified Mail
Return Receipt Requested

DECISION

United States : The Nancy, Sunrise and Coyote
: Placer Mining Claims situated in
v. : the $S\frac{1}{2}$ sec. 6, T. 4 S., R. 6 E.,
Mary V. Chamberlin : S.B.M., California.

Decision Affirmed

Mrs. Chamberlin has appealed from a decision of the Hearing Examiner, dated September 4, 1959, declaring the Nancy, Sunrise and Coyote Placer mining claims null and void. The mining claims were declared invalid for want of discovery.

The claims were located in January and April 1948. The lands embraced therein were subsequently classified for small tract purposes by California orders Nos. 80 and 138 dated August 27, 1948 and April 13, 1949, respectively. The lands are now under small tract lease.

The contest proceeding was initiated by the Bureau of Land Management by service of a complaint charging that the land within the claims is nonmineral in character and that a discovery, within the meaning of the mining laws, has not been made within the limits of the claims. The contestee denied the charges and affirmatively averred that the stone (sand and gravel) for which the claims were located was a valuable mineral deposit capable of being marketed at a profit.

The Government's evidence, at the hearing conducted May 7, 1959, showed that the sand and gravel found within the three mining claims is similar in type to many other such deposits found within the Coachella Valley and that the only uses for such material are for fill and construction purposes. It showed that the area is amply supplied by presently producing firms and that the deposits found within the subject claims were not susceptible of being marketed at a profit. Evidence was also introduced indicating that the deposits within the limits of the claims are not of commercial quantity or quality.

Evidence was adduced in behalf of the contestee to show that the sand and gravel deposits are of commercial quality and quantity and due to the growth of the area a reasonable prudent man would be justified in the further expenditure of labor and means in developing the claims into valuable mining properties. It was shown that efforts had been made to market the material from the claims but that for one reason or another no materials had ever been sold from the claims and no contract had been entered into for the sale of the materials.

The appellant contends that minerals have been found within the limits of the claims in sufficient quantity to constitute a discovery, that there is a good demand and a rapidly growing market in the area and that the minerals can be sold at a profit.

A classification of lands for small tract purposes serves to close those lands to mineral location. Cf. The Dredge Corporation, 64 I.D. 368 (1957). It follows that the claims are without validity unless perfected by discovery prior to the dates of the small tract classifications. Further, even if previously effected the locations would be of no validity unless the lands are at present valuable for the materials for which they were located. United States v. Lem A. Houston et al., 66 I.D. 161(1959). Cf. Las Vegas Sand and Gravel Co., Inc., A-27761 (June 16, 1960), 67 I.D. ____.

It has been consistently held that to satisfy the requirement of discovery on a placer mining claim located for sand and gravel prior to July 23, 1955, it must be shown that the deposit can be extracted, removed and marketed at a profit and where the mineral claimant fails to make that showing the claim is properly declared null and void. United States v. Everett Foster et al., 65 I.D. 1(1958); Foster v. Seaton, No. 14953, United States Court of Appeals for the District of Columbia (October 22, 1959); Clear Gravel Enterprises et al., A-27967 (December 29, 1959).

Even assuming the deposits within the Nancy, Sunrise and Coyote mining claims to be of commercial quantity and quality, the claims are without validity unless perfected by discovery, i.e., unless it is shown that the materials from the claims can be extracted, removed and marketed at a profit.

The area in which these claims are situated and which could be supplied with material from them (if the material were of commercial quantity and quality) underwent rapid growth during the eleven year period since the claims were located. Yet during that entire period the appellant had failed to sell any of the material or enter into any contract for the sale thereof although efforts looking to their sale were made. When this is considered with the evidence presented by the Government we can conclude that at no time since location, and including the present time, could the deposits be extracted, removed and marketed at a profit. "To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development." Foster v. Seaton, supra.

Therefore, since there is no present valid discovery the Nancy, Sunrise and Coyote Placer mining claims are null and void. And it is not necessary to consider whether a discovery existed prior to the small tract classification or prior to the act of July 23, 1955 (30 U.S.C. sec. 611). The mining claims being void for lack of discovery it is not necessary to pass on charge number 1 concerning the mineral character of the land.

The Hearing Examiner's decision is affirmed.

Mrs. Chamberlin is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $15.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is:

Regional Solicitor
Department of the Interior
P.O. Box 4291
Sacramento, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mrs. Mary V. Chamberlin, (Certified Mail)
Mr. Frank R. Wicks, (Regular Mail)
Minerals Staff Officer (3)
Hearings Administrative Officer
John Wood, Hearing Examiner
Appeals List No. 1
BF

LEASABLE MINERALS * 5 Sodium
(Other than oil and gas)

Where the Geological Survey finds lands not prospectively valuable for sodium, but states they have no objection to issuing a prospecting permit, such permit may be issued for lands not embraced in conflicting surface entries.

Frank B. Leonard, Los Angeles 0152055 (July 15, 1960)

In reply refer to:

Los Angeles 0152055
5.04g

July 15, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

DECISION

Frank B. Leonard : Sodium Prospecting Permit

Case Remanded

Mr. Leonard has appealed from a decision of the Chief, Mineral Adjudication Unit, California Land Office at Los Angeles, which rejected in its entirety the above-identified application, filed on June 27, 1958 under provisions of section 23 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 261), based on a report by the Geological Survey that there is no prospective value for sodium in the lands applied for and which recommended rejection. 1/

The appellant contends, in substance since sodium prospecting permits have been issued for lands in the immediate vicinity, and it is impossible to determine, without drilling, that one section has prospective value while an adjoining section has not, that his application should be granted. He further states that he has made arrangements to have part of the land tested for sodium by drilling.

A supplemental report by the Geological Survey repeats that present information does not indicate any prospective value for sodium, but state they have no objection to issuing a prospecting permit on available lands.

Accordingly, the case is remanded for further processing and the issuance of a sodium permit on available lands.

Acting Director

Distribution on page 2

1/ The sodium permit application remains properly rejected as to the lands embraced in surface entries. Bertram N. Beal, 51 L.D. 162 (1925).

DISTRIBUTION:
Mr. Frank B. Leonard (Regular Mail)
Mineral Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
EG

LEASABLE MINERALS * 5 Sodium
(Other than oil and gas)

Where a prospecting permit for land not prospectively valuable is rejected because of a recommendation by the Geological Survey, and on appeal the objection is withdrawn, the case will be remanded for further consideration and the issuance of a permit, all else being regular, on all lands not embraced in surface entries.

Grady B. Gulledge, Los Angeles 0151635 (July 15, 1960)

In reply refer to:

Los Angeles 0151635
5.04g
July 15, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

DECISION

Grady B. Gulledge : Sodium Prospecting Permit Application

Decision Vacated; Case Remanded

Mr. Gulledge has appealed from a decision of the Chief, Mineral Adjudication Unit dated October 13, 1959, which rejected his above-identified and other sodium prospecting permit applications, submitted under the provisions of section 23 of the Mineral Leasing Act of 1920, as amended (30 U.S.C., 1958 ed., sec. 261), on the grounds that the Geological Survey, on September 8, 1959, reported the lands not prospectively valuable for sodium.

In a supplemental report dated July 1, 1960, upon reviewing the case, the Geological Survey finds that they have no objection to the issuance of the prospecting permit on any lands not in conflict with surface entries.

In view of the withdrawal of the objection by the Geological Survey to the issuance of a permit, the decision of the Chief, Mineral Adjudication Unit, is vacated and the case is remanded to the Manager, through the Bureau's Assistant to the State Supervisor at Los Angeles, for further consideration and the issuance of a sodium prospecting permit, all else being regular, as to lands upon which there are no surface entries.

Earl J Thomas
Acting Director

DISTRIBUTION:

Mr. Grady B. Gulledge (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
EG

76861-60

MINING CLAIMS * 6 Lands Subject to

Prior to the passage of the act of August 11, 1955, a mining claim located on lands then withdrawn for power site purposes and not restored to entry under section 24 of the Federal Power Act at the time of location, is null and void.

Michael J. Bailey, S-6983 (Sacramento) (July 15, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento S-6983
5.04g

July 15, 1960

Certified Mail
Return Receipt Requested

DECISION

Michael J. Bailey, C. C. Ogden and R. Naomi Ogden	:	Davis Gulch Placer Mining Claim Situated in the NW¼NW¼ sec. 21, T. 32 N., R. 6 W., M.D.M. Calif.

Decision Affirmed

Mr. Bailey has appealed from a decision of February 10, 1960, declaring the Davis Gulch Placer Mining Claim null and void. The claim was declared invalid for the reason that it was located on May 5, 1947, on land included in Power Project #247, effective March 2, 1923, and thus withdrawn from mineral entry.

The appellant alleges no error in the decision appealed from; he asserts that he should be reimbursed for his improvements thereon and for the assessment work performed.

The Department has consistently held that prior to the passage of the act of August 11, 1955 (30 U.S.C. sec. 621 et seq.), lands embraced in power site withdrawals were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power site purposes but prior to the passage of the act of August 11, 1955, is null and void unless the land embraced in the claim was restored to entry under section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). It follows that the Davis Gulch, located when the land involved was not subject to appropriation under the mining laws, is null and void ab initio. And the appellant is not entitled to any compensation from the Government for his improvements or labor on the void mining claim.

The decision appealed from is affirmed.

Mr. Bailey is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Earl D Thomas

Acting Director

Enclosure

DISTRIBUTION:

Mr. Michael J. Bailey (Certified Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

A mining claim located on land subject to a first form reclamation withdrawal initiates no rights in the locator and is void from its purported inception.

Frank E. McCoy and H. D. Barnes, Sacramento S-5292 (July 28, 1960)

In reply refer to:
Sacramento S 5292
10-148 (Contest)
5.04g
July 28, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Frank E. McCoy and H. D. Barnes	:	Buckhorn Quartz Mining Claim located in Sec. 18, T. 34 N., R. 8 W., M.D.M., California.

Decision Affirmed

Messrs. McCoy and Barnes have appealed from a decision of April 5, 1960, declaring the Buckhorn Quartz Mining Claim null and void. The decision recited that the claim was located at a time when the land was not subject to mining appropriation.

The Buckhorn, also known as the Buckeye was originally located on April 8, 1932, by W. N. Howell and the appellant McCoy. Contest proceedings, 10-148, charging lack of discovery and that the land is nonmineral in character was initiated against the original location. Service of the complaint being had on the locators and no answer being filed, the charges were taken as confessed and the claim was declared invalid by decision of December 29, 1958. No appeal was taken; the December 29 decision became final and the case was closed.

The Buckeye was again located on July 2, 1958, by McCoy and Barnes. However, since the land has been embraced in a withdrawal dated November 10, 1955,* for the Proposed First Form Reclamation Trinity River Division, Central Valley Project, the Land Office Manager held the claim void for having been located on lands then withdrawn from mining location. See A. V. Toolson et al., 66 I.D. 48 (1959); R. J. Walter et al., A-27243 (March 15, 1956).

The appellants state that Walter N. Howell is deceased and that McCoy "assumed his $\frac{1}{2}$ of the claim and have carried on since his death, with the claim. *** We relocated wanting to comply with the *** Multiple Use Permit Law as of July 1955 ***."

All rights under the original location of 1932 terminated upon or prior to the purported relocation. Further, the 1932 location was declared void by the decision of December 29, 1958. It follows that the appellants' rights, if any, stem only from the location of July 2, 1958. At that time the land embraced within the Buckeye was closed to mining because of the reclamation withdrawal. It follows that the location of July 2 is of no effect and the Buckeye null and void ab initio.

---

* The proposed withdrawal by the Commissioner of Reclamation of November 10, 1955 was concurred in by the Bureau of Land Management on March 12, 1956, and filed with the Federal Register on March 15, 1956; it appeared in 21 F.R. 1677 on March 16, 1956. The withdrawal was effective as to the appellants on March 15, 1956. See Ass't Sol. Op. M-36382(October 24, 1956).

The Land Office decision is affirmed.

Messrs. McCoy and Barnes are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-3165. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Charles P. Mead
Acting Director

Enclosure

DISTRIBUTION:

Mr. Frank E. McCoy (Certified Mail)
Mr. Homer Dan Barnes (Certified Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

78567-60

DOCKET FILES

MINING CLAIMS * 16 Application for Patent
* 5 Discovery

A mineral patent application, otherwise regular, may not be rejected for lack of discovery without a contest proceeding charging lack of discovery.

David L. King et ux., Sacramento 056599 (July 28, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Sacramento 056599
5.04g

July 28, 1960

DECISION

David L. King and
Kathryn King

Mineral Patent Application
Amy-K Placer Claim situated
in the $E\frac{1}{2}SE\frac{1}{4}$ sec. 3, T. 22 N.,
R. 11 E., M.D.M., California

Case Remanded

Mr. and Mrs. King have appealed from a decision of January 29, 1960, rejecting their application for mineral patent to the Amy-K Placer Claim. The application was rejected for the reason that it did not specifically identify the "discovery" within the claim.

The appellants filed mineral patent application Sacramento 056599 on September 22, 1958. By decision of April 7, 1959, they were informed of certain deficiencies therein and afforded time to supply the additional evidence required. On May 11, 1959, the appellants submitted an amendment to the application and otherwise attempted to furnish the Land Office with the evidence requested. In pertinent part, the decision appealed from stated the application as amended did not comply with the regulations or with the earlier decision in that it did not specifically state and identify the mineral for which the claim was located. The appellants on appeal assert the application is specific and the application is based on a valid discovery of placer gold deposits.

Perusal of the patent application records shows the appellants have described their alleged discovery points (which appear to be open for inspection). Although they state that approximately 30 acres may sustain a stone and gravel operation, the inference is clear that such operation would be but incident to the contemplated gold mining activities. Of course, if the gold has been mined out of the 30 acres a prospective market for that material could not serve to validate the claim as to those 30 acres. See Foster v. Seaton, 271 F. 2d 836 (1959).

Since the alleged discovery is of an intrinsically valuable mineral, there was no warrant for the Land Office to reject the application for lack of discovery, i.e., non-marketability of stone deposits. Therefore, the decision of January 29 is vacated, and the case record remanded through the Bureau's State Supervisor at Sacramento, for further processing of the patent application. If examination of the lands indicates the claim may be invalid for lack of discovery, contest proceedings will be necessary before the application may be rejected for that reason.

Charles P. Mead

Acting Director

DISTRIBUTION:

Mr. & Mrs. David L. King (Regular Mail)
Minerals Staff Officer (3)
Mr. John Sieker, Forest Service, U.S.D.A. (8)
Appeals List No. 1
BF

78567-60

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

Where a location certificate covers power site lands, some of which are also withdrawn for flood control purposes, it is proper to reject the location certificate as to the lands embraced in the flood control withdrawal. The location certificate is acceptable for filing under P.L. 359 as to the lands only in the power site withdrawal.

Francis N. Dlouhy, ML 217 (Sacramento) (July 29, 1960)

In reply refer to:
ML 217 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

July 29, 1960

Certified Mail
Return Receipt Requested

DECISION

Francis N. Dlouhy : Asbestos King Placer Mining Claim covering the W$\frac{1}{2}$ SE$\frac{1}{4}$ and S$\frac{1}{2}$NE$\frac{1}{4}$ sec. 9, T. 12 S., R. 25 E., M.D.M., California

Decision Affirmed in Part; Reversed in Part

Mr. Dlouhy has appealed from a decision of February 15, 1960, rejecting a notice of location for the Asbestos King placer mining claim, offered for filing in purported compliance with the act of August 11, 1955 (30 U.S.C. secs. 621-625; Public Law 359-84 Cong.). The decision recited that certain lands covered by the claim, viz., the SE$\frac{1}{4}$NE$\frac{1}{4}$ and the SW$\frac{1}{4}$SE$\frac{1}{4}$ sec. 9, were withdrawn on May 20, 1949 by Public Land Order 586 1/ for use of the Department of the Army for flood control purposes in connection with the Pine Flat Dam and Reservoir and not open to location on January 22, 1960, when the Asbestos King was located. (The other lands covered by the claim were previously restored to entry under section 24 of the Federal Power Act.)

Although Public Law 359 removed, in the main, power site withdrawals as a bar to locations made thereafter on lands so withdrawn, it provided that "Nothing in this chapter shall affect the validity of withdrawals or reservations for purposes other than power site development." 30 U.S.C. sec. 621(c). Thus, the SE$\frac{1}{4}$NE$\frac{1}{4}$ and SW$\frac{1}{4}$SE$\frac{1}{4}$ sec. 9, withdrawn for power purposes and for the further purposes enumerated in Public Land Order 586, were n restored to entry by the general provisions of the act. The location certificate was properly rejected for filing insofar as it covered the lands withdrawn for flood control purposes. The Land Office decision is affirmed to that extent.

The remaining lands within the claim, the SW$\frac{1}{4}$NE$\frac{1}{4}$ and the NW$\frac{1}{4}$SE$\frac{1}{4}$, however, are open to location under the provisions of Public Law 359. The location certificate insofar as it covered these lands should have been accepted for filing, and the Land Office decision is reversed to that extent.

Mr. Dlouhy is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-3165. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

1/ Published in the Federal Register on May 27, 1949, 14 F.R. 2797.

When this decision becomes final the record will be returned through the Bureau's State Supervisor at Sacramento, for the further processing of the location notice in accordance with this decision.

Charles P. Mead

Acting Director

Enclosure

DISTRIBUTION:

Mr. Francis N. Dlouhy (Certified Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

appeal to Sec
affirmed A-28648 7-31-61

DOCKET FILES

LEASABLE MINERALS * 1 General

* 4 Potassium Prospecting Permit Application

An application for a prospecting permit is merely a request that a permit be granted and confers no interest upon the person making the application.

Where the regulations are amended after an application is filed requiring an applicant for a prospecting permit to pay a yearly rental and furnish a $1000 bond (43 CFR 194.8(b) and 194.10) the applicant may be required to comply with the regulations in effect when his application is reached for final adjudication and the issuance of a permit.

Cecil H. Phillips et al., Los Angeles 0164574 etc. (August 8, 1960)

In reply refer to:

Los Angeles 0164574 etc.
(See Appendix)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 8, 1960

Certified Mail
Return Receipt Requested

DECISION

Cecil H. Phillips et al. : Potassium Prospecting Permits

Decisions Affirmed

Mr. Cecil H. Phillips, individually as an appellant and as attorney for the other appellants, has appealed from decisions of the Chief, Minerals Adjudication Unit, Los Angeles Land Office, in so far as these decisions held for rejection some twenty applications filed under the provisions of the act of February 7, 1927 (30 U.S.C., 1958 ed., secs. 281-287) and allowed the respective applicants 30 days from service of notice of each decision within which to pay the first year's rental of 25 cents an acre and furnish a $1000 bond as required by the amended regulations 43 CFR 194.8 (b) and 194.10 which became effective October 5, 1959 1/ after the applications under appeal had been filed.

Mr. Phillips, for the appellants, contends, in substance, that they complied with the regulations in effect at the time the applications were filed and did all things necessary to constitute a valid "entry" of the described lands; that the bond requirement is unnecessary before actual mining operations, and that the rental of 25 cents per acre per year is five times what it reasonably should be. He states, further, that the Secretary does not have the power to make a retroactive decision in connection with a land entry which has been allowed and seems to compare rights under these prospecting permit applications with the "equitable title" and "vested rights" of a land entryman. He suggests these may be proper cases for the Bureau to consider with a view to returning all fees to the applicants.

1/ Filed October 5, 1959 and published (24 F.R. 8067) October 6, 1959; Circular 2027.

These contentions are without merit. Under the act of February 7, 1927, *supra*, the Secretary is authorized, under such rules and regulations as he may prescribe, to grant any qualified applicant a prospecting permit. Previous departmental decisions have held that an application for a permit to prospect for minerals pursuant to the leasing act is a mere request that a permit be granted and, unlike an allowed surface entry, confers upon the person making such application no interest in the land described or the mineral deposits therein. See *Dorothy P. Soeth*, 60 I.D. (1947), and cases referred to therein. An applicant is properly required to comply with the regulations effective at the time his application is reached for final adjudication and the issuance of a permit. As to the return of fees paid by the applicants the departmental regulations, 43 CFR 194.8, provide in pertinent part:

> "(a) * * * The application *must* be accompanied by a filing fee of $10 *which is not returnable*, and by full payment of the *first year's rental* in the amount specified in paragraph (b) of this section * * *"
> (Underlining supplied)

For the reasons given, the decisions appealed from are considered correct and are affirmed.

Mr. Phillips and the other appellants he represents are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for *each* of the 20 cases included in the appeal. If the appeal covers *all 20* cases adversely affected by this decision the total filing fee is $100. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Cecil H. Phillips, Attorney for the Appellants (Certified Mail)
Other appellants (appendix) (Regular Mail)
Minerals Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
EG

APPENDIX
(20 Appealed Cases)

	Date of Filing	Date of L.O. Decision
Applicant - Cecil H. Phillips, P. O. Box 293, South Pasadena, California		
LA 0164574	6-29-59	1-29-60
LA 0164575	6-29-59	1-28-60
LA 0164576	6-29-59	1-28-60
LA 0164583	6-29-59	1-28-60
LA 0164584	6-29-59	1-27-60
Applicant - Melba H. Rosi, 1603 Hope Street, South Pasadena, California		
LA 0165133	8-31-59	1-27-60
LA 0165134	8-31-59	1-27-60
LA 0165135	8-31-59	1-28-60
LA 0165136	8-31-59	1-28-60
LA 0165137	9-1-59	1-28-60
LA 0165141	8-31-59	1-28-60
LA 0165142	8-31-59	1-27-60
Applicant - Leota H. Payne, 1963 Corson Street, Pasadena 8, California		
LA 0165857	10-2-59	1-29-60
LA 0165858	10-2-59	1-29-60
LA 0165860	10-2-59	2-17-60
LA 0165861	10-2-59	2-17-60
Applicant - William Z. Thompson, 327 East Green Street, Pasadena, California		
LA 0165763	10-1-59	2-17-60
LA 0165764	10-1-59	2-17-60
LA 0165765	10-1-59	2-17-60
LA 0165766	10-1-59	3-3-60

appeal to Sec. 8-30-61
affirmed A-28653
68 ID

DOCKET FILES

MINING CLAIMS * 1 Generally

Where, in a proceeding in accordance with 5(c) of the Act of July 23, 1955, the assertion of the Government, that a valid discovery was not made prior to the date of the act, is established, the mining claim is subject to the terms and limitations of section 4 of the act.

The United States & Clarence E. Payne, P. L. 167, PL9-23 (Sacramento)
(August 8, 1960)

In reply refer to:

P.L. 167, PL 9-23
(Sacramento)
5.04g
August 8, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
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DECISION

The United States and Clarence E. :
Payne, Mining Claimant :
:
In the Matter of Determination :
of Surface Rights on Certain :
Unpatented Lands of the United :
States under Section 5 of the Act :
of July 23, 1955 (69 Stat. 367; :
30 U.S.C. sec. 613). :
:

Block Head II Quartz Mining
Claim situated in lot 2,
Section 24, T. 6 N., R. 12 E.,
M.D.M., California

Decision Reversed

The Government has appealed from a decision of the Hearing Examiner, dated November 21, 1958, which, in effect, held that the Block Head II Quartz Mining Claim was not subject to the use and management by the United States in accordance with section 4 of the Multiple Use Act of July 23, 1955 (30 U.S.C. sec. 613); Public Law 167-84C).

A notice to mining claimants under section 5 of the Act was published upon the request of the Bureau of Land Management; the area so published included the Block Head II mining claim. After the verified statement required by the Act was filed the Hearing Examiner notified the mining claimant, Mr. Clarence E. Payne, that the Government, at the hearing to be conducted, would offer evidence to prove (1) that a discovery of valuable mineral has not been made within the limits of the unpatented mining claim and (2) that the land included within the claim is, prior to the patenting thereof, subject to the use and management of the United States in accordance with section 4 of P.L. 167-84C.

The appellant contends that the decision appealed from is contrary to law and against the weight of the evidence.

The Multiple Use Act, in pertinent part, provides an in rem (quiet-title) procedure whereby the Government may expeditiously resolve uncertainties as to the surface rights of a location. It provides, as to locations effected or validated subsequent to July 23, 1955, that the mineral claimant's rights shall be subject, prior to the issuance of patent, to the right of the Government to manage and dispose of the vegetative resources and to the right of the United States, its permittees and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land. In effect, it provides that the Government shall not be liable in trespass to the owner of the claim, after the patenting thereof because of its management of the surface resources prior to patenting where the claim is located, effective, or validated subsequent to the date of the act. The purpose of the hearing in this proceeding was solely to inquire and determine whether the Block Head II had been validated by discovery prior to the date of the act. If validated subsequent to July 23, 1955, even though located prier thereto, the Government has the right to manage the surface resources of the land included within that claim; if validated prior to that date the right of the mining claimant to the use of the surface without the Government's right to manage the surface resources thereof remains undisturbed.

We shall review the record and decision appealed from to determine whether the Block Head Quartz mining claim is subject to the terms and provisions of section 4 of the act.

The Government's evidence at the hearing conducted on July 22, 1958, consisted of testimony of several qualified mineral examiners who had each previously examined the land within the claim. After preliminary discussio concerning the geology of the area and the claim, they testified, in substance, that cuts Nos. 1 and 2 disclosed veins of quartz in place. The vein in cut #1 pinched out about 3½ to 4 feet below the ground surface and widened to approximately 20 inches in width and about 3 feet from the base of the pit (approximately 18 feet from the surface as estimated from contestant's exhibits 7 and 8 but stated as 21 feet by the claimant in TR 94) it narrowed to about 8 inches in width and was truncated by an intrusive in the bottom of the pit. TR 41. The vein in cut #2 was defined as a rather contorted small vein pinching out very near the present surface of the ground. TR 44. Material taken from the face of the vein in cut #1 assayed at an average of 17¢ per ton; this although an assay very near the surface disclosed value of $1.05 per ton. Assays of material from the vein in cut #2 showed approximately the same values. The examiners were of the opinion that greater values than those already disclosed would not be found within the limits of the claim. It was estimated that mining costs would exceed $25.00 per ton and that a prudent man, considering the assay values and extent of the veins, would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developimg a valuable mine.

Mr. Payne, testifying in his own behalf, stated that the claim was located for the gold values contained therein. He stated that cut #2 had disclosed but a "couple of hundred pounds of quartz" and no further work was contemplated there. TR 99. He did not question the assay reports of the Government but stated that the widest part of the vein in cut #1 was 30 inches and that a 15 pound sample taken from an individual boulder in that cut assayed at $7.00 per ton. He further testified that on the day prior to the hearing he had made a discovery of staurolite and that the claim was worth while further prospecting and developing for the values of staurolite therein contained. The costs of mining for gold as represented by the Government witnesses werenot discussed by the claimant or his other witness. Assertion was made that a prudent miner would be justified in further exploration and development of the claim.

The Government's rebuttal testimony was to the effect that staurolite was non-existent within the claim.

We pointed out above that the sole question for determination by the Examiner was whether the Block Head II mining claim was properly subject to section 4 of the act. The Government established its case, by showing that greater values than those shown may not be reasonably anticipated within the claim and that the costs of mining far exceeded the possible recovery values of minerals from the veins therein. The reasonable conclusion, absent evidence to the contrary, is that a prudent man would not be justified in further efforts to develop a valuable mine and thus, that the mining claim was subject to the provisions of section 4.

The mining claimant did not refute the evidence of the mineral examiners. At most he offered evidence indicating a slight mineralization of staurolite within the limits of the claim.

The Government initially has the burden of going forward with the evidence with respect to its assertions concerning discovery on a mining claim at a hearing conducted in accordance with section 5(c) of the act. Cf. United States v. Foster, 65 I.D. 1, 11 (1958). By a clear preponderance of the evidence, the Government established, even though the claimant is diligently exploring the claim, that it was not effective or perfected prior to the act and is subject to the terms and limitations thereof.

Therefore, the decision of the Hearing Examiner is reversed. The Block Head II Quartz Mining Claim is, perforce, subject to the terms and limitations of section 4 of the act.

Mr. Payne is allowed the right of appeal to the Secretary of the Interior in accordance with regulations in 43 CFR Part 221, as amended. See enclosed From 4-1365. In taking an appeal, there must be strict compliance with the regulations.

In the event of an appeal, the adverse party to be served is:

Regional Solicitor
Department of the Interior
4th and J. Streets
Post Office Box 4291
Sacramento 21, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Gilmore & Gilmore (Certified Mail)
Mr. Clarence E. Payne (Regular Mail)
Regional Solicitor (Regular Mail)
Minerals Staff Officer (3)
Hearings Administrative Officer
Geological Survey (3)
Appeals List No. 1
BF

78968-60

DEPT. OF INTERIOR
SACRAMENTO, CAL.
SEP 6 3 [illegible] 1960
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

Mining claims located on lands not then subject to location because they are covered by a withdrawal under the public land laws, including the mining laws, initiates no rights in the locators and are invalid.

Roy C. Ruiter et al., Los Angeles 0166491 (August 11, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Los Angeles 0166491
5.04g

August 11, 1960

Certified Mail
Return Receipt Requested

DECISION

Roy C. Ruiter et al. :

: Turtle Nos. 21, 22, 23 and 24 Placer
: Mining Claims covering section 18,
: T. 11 N., R. 10 W., S.B.M., Calif.

Decision Affirmed

Mr. Ruiter and other co-locators of the Turtle Nos. 21, 22, 23 and 24 Placer mining claims have appealed from a decision of January 13, 1960, declaring those claims null and void.

Public Land Order No. 1051 of January 6, 1955, appearing in 20 Federal Register 291 (January 13, 1955), withdrew for an Aerial Gunnery Range for the Department of the Navy, all of section 18, T. 11 N., R. 10 W., S.B.M., California (643.90 acres). H. C. Gaylord, d.b.a. Placer Claims Service located the Turtle claims in the names of the appellants on October 10, 1958. The lands covered by the claims cover all of section 18. The lands withdrawn in January 1955 have not been restored to entry.

At the time the Turtle claims were located Section 18 was withdrawn from all forms of appropriation under the public land laws, including the mining laws by Public Land Order No. 1051. Consequently, at the time of location the land in question was not available for mining location, the attempted location was ineffective, and the locators acquired no rights in the land by their location procedures. Cameron v. United States, 252 U.S. 450 (1920). It matters not that the Navy may not now be using the land; so long as the withdrawal is in effect and the lands have not been restored, they are severed from the general mass of public domain and are not subject to location. Mining claims located on such lands are null and void.

The Land Office decision is affirmed.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5.00 for each [illegible].

mining claim included in the appeal. If the appeal covers all claims adversely affected by this decision the total filing fee is $20.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Alan T. Selznick, Attorney at Law
(Certified Mail)
Hon. Harry R. Sheppard, House of Representatives
Roy C. Ruiter
Oscar D. Robinson
Rollo R. Rooker
Elroy and Loraine Ruiter
Jack Young
Thornton B. and Ruth Adams
Walter Converse
Richard J. Butler
James E. Barnes
D. D. Donovan
Kate C. Motley
Henry H. Machal
Russell R. Geary
J. W. Bateman
Paul Elder

[illegible]
Victor J. Olivitz
Olive E. Butler
Evalon E. Smith
Clarence L. Smith
Leon E. Houk
Roger R. Rioux
Martin Muker
Alphonsus Dimmer
Harold D. Jefferson
Lois Jackson
Tom Butler and Richard Butler
Earl G. Franz
Carl W. Jackson
Vincent Parke
Minerals Staff Officer (5)
Lands Staff Officer
Appeals List No. 1
BF

DOCKET FILES

MINING CLAIMS * 6 Lands Subject to

Prior to the passage of the act of August 11, 1955, lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location.

Louis and Kathleen Knechtli, P. L. 359 (Sacramento) (August 17, 1960)

DEPT. OF INTERIOR
SACRAMENTO, CAL.
SEP 6 3 03 PM 1960
BUREAU OF
LAND MANAGEMENT
LAND OFFICE

In reply refer to:
P.L. 359 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

August 17, 1960

Certified Mail
Return Receipt Requested

DECISION

Louis Knechtli : Barton Placer
Kathleen Knechtli : Mining Claim
:

Decision Affirmed

Louis and Kathleen Knechtli have appealed to this office from a decision of November 25, 1959, by the Chief, Minerals Adjudication Unit, Land Office, Sacramento, California, declaring the Barton Placer Mining Claim null and void for the reason that at the time the claim was located the lands involved had been withdrawn for a power site reserve and the lands were not open to mining location at that time.

The record indicates that the appellants claim was located on July 19, 1932, on land described as the NW¼SW¼NW¼ and that portion of the SW¼NW¼NW¼ lying south of the south end line of the Pension Placer Mining Claim, all in Sec. 25, T. 8 N., R. 9 E., M.D.M., California. According to the official plat of survey, the above described lands covered by the appellants mining claim lie within Lots 1 and 3 of Sec. 25. The record shows that Lots 1 and 3 of Sec. 25, among other lands, were included in Power Site Reserve No. 487 on May 11, 1915. Subsequently, on May 10, 1957, Lot 3, together with other lands, was restored to mineral entry, subject to section 24 of the Federal Power Act.

The appellants assert that their claim is "derived from claims and workings of said property prior to the withdrawal of said lands," and that they have "established a valid mining claim by adverse possession."

The 1932 location, from which the appellants derive their title, was made about 17 years subsequent to the 1915 withdrawal. Assuming that the appellants could show that they are the successors in interest of a valid mining location made on this land prior to the date of the Power Site Reserve, such a claim, of course, would not have been invalidated by this Power Site Reserve.

However, such a claim would still be null and void for their failure to file a location notice in the land office within one year after the enactment of the act of August 11, 1955 (30 U.S.C., secs. 621-625) as required by section 4 thereof. See Solicitor's Opinion, 64 I.D. 393 (1957); United States v. M. V. Browning, Administrator, A-28182 (April 14, 1960). However, in the absence of proof of ownership in the appellants of the alleged, earlier locations mentioned in their appeal, we must confine our decision in this case to the 1932 location. Cf. A. V. Toolson et al., 66 I.D. 48 (1959).

The Department has consistently held that prior to the passage of the act of August 11, 1955 (30 U.S.C., 1952 ed., sec. 621-625), lands embraced in an existing power-site withdrawal were not open to mining location, and a mining claim located subsequent to a withdrawal of the land for power-site purposes, but prior to passage of the act, is null and void where the land embraced in the claim had not been restored to entry under section 24 of the Federal Power Act at the time of location. Day Mines, Inc., 65 I.D. 145 (1958). Since the Appellants claim was located in 1932, at a time when the lands involved were not open to mining location, the claim was void ab inito.

We turn now to the assertion by the appellants that they have established a valid mining claim by adverse possession pursuant to section 2332, Revised Statutes (30 U.S.C., sec. 38). In order for mining claimants to invoke sections 2332 of the Revised Statutes, among other things, the land must be open to mineral entry. See Solicitor Opinion, M-36388 (November 13, 1956) and cases cited therein. The act of August 11, 1955, supra, does not operate retroactively to validate mining claims which were located on lands subject to a power site reserve or withdrawal on the date of the purported location. Section 2 of the act operates to open lands in power sites to mining location only prospectively, i.e., from the effective date of the act. See Day Mines, Inc., supra, Assuming that since the date the land in question became subject to mining locations a valid location could have been made under the mining laws, the appellants have not alleged that any location has been attempted since this date. It is obvious, therefore, that section 2332 of the Revised Statutes, supra, is not applicable.

Accordingly, the decision appealed from is hereby affirmed.

Louis and Kathleen Knechtli are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

Distribution on page 3

BUREAU OF LAND MANAGEMENT
SEP 6 3 04 PM 1960

DISTRIBUTION:

David M. Yorton, Attorney (Certified Mail)
Louis and Kathleen Knechtli (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
WHW-JBP

79460-60

DEPT. OF INTERIOR
SACRAMENTO, CAL.

SEP 6 3 03 PM 1960

BUREAU OF
LAND MANAGEMENT
LAND OFFICE

DOCKET FILES

MINING CLAIMS * 3 Contests

Where a contestee failed to timely answer and specifically deny the charge in a complaint charging lack of discovery, the charge was properly taken as confessed, and the Manager did properly declare the mining claim null and void.

United States v. R. C. Fields, Contest 5742 (Sacramento) (September 22, 1960)

In reply refer to:
Contest 5742 (Sacramento)
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 22, 1960

Certified Mail
Return Receipt Requested

DECISION

United States :
v. :
R. C. Fields, :
R. W. Fields :

: Robert William Lode Mining Claim
: Situated in the NW¼ sec. 27,
: T. 10 N., R. 20 E., M.D.M.,
: California

Decision Affirmed

Mr. Robert C. Fields has appealed from a decision of the Manager, Sacramento Land Office, dated April 14, 1960, in which the charges of invalidity previously initiated against the above-identified mining claim were taken as confessed because of the mining claimants' failure to file a timely answer denying the charges, and the claim was declared null and void.

Contest proceedings against the Robert William mining claim were initiated by the Bureau charging that the land embraced within the claim is nonmineral in character and that a valid discovery, within the meaning of the mining laws, had not been made. The complaint was served on each of the parties on February 25, 1960. The contestees each failed to answer the complaint, and the Manager took the charges as confessed and declared the mining claim null and void.

Regulation 43 CFR 221.64 provides, in material part, that within 30 days after service of the complaint the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint. Regulation 43 CFR 221.65 provides that if an answer is not filed as required, the allegations of the complaint will be taken as admitted by the contestee and the Manager will decide the case without a hearing. And the complaint specifically advised the appellant to this effect.

The contestees' failure to timely deny the charges of the complaint must be taken as a confession of the truth of those charges. Gabbs Exploration Company, 67 I.D. 160 (1960).

The appeal does not allege any error in the decision appealed from and fails to set forth any reason warranting a reversal of that decision. Nor was any showing made indicating that the result of a hearing would alter or change the decision appealed from if the appellant were permitted to interpose an answer.

Therefore, no error appearing in the record, the Manager's decision is affirmed.

Mr. Fields is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Acting Director

Enclosure

DISTRIBUTION:

Mr. Robert C. Fields (Certified Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

81268-60

DOCKET FILES

MINING CLAIMS * 16 Application for Patent

An applicant for mineral patent is required to show that the patent improvments have been made by himself or his grantors. 43 CFR 185.70, 185.71(e).

Bradley-Turner Mines, Inc., Sacramento 055848 (September 22, 1960)

In reply refer to:
Sacramento 055848
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 22, 1960

Certified Mail
Return Receipt Requested

DECISION

Bradley-Turner Mines, Inc.	:	Bradley-Turner Consolidated Placer Mine

Decision Affirmed as Modified

Bradley-Turner Mines, Inc., has appealed from a Land Office decision of April 4, 1960, requiring the submission of additional evidence to support its mineral patent application, Sacramento 055848. The decision required the appellant to more particularly describe its discovery points, the quantity and value of yardages of material removed in placer operations, the yardages and values thereof yet remaining as well as verification that patent improvements were made by the appellant or its predecessors in interest upon penalty of rejection of the application.

Review of the patent application discloses that the appellant described its discovery cuts and sizes of diggings in detail. It showed the values of materials removed and the estimated yardage and values remaining. It further described the patent improvements upon each claim and the value thereof. The improvements are asserted to be many times in excess of the minimum $500.00 value required by law.

Since the appellant described its discovery cuts, sizes of diggings, the values removed and remaining, no further requirement should have been made concerning these matters. However regulation 43 CFR 185.70 requires that proof be made showing the value of improvements to be not less than $500.00 and that they were made by the applicant for patent or his grantors. This proof should consist of the statements of at least two disinterested witness. Also see 43 CFR 185.71(e). The proofs submitted do not show or disclose that the improvements were made by the applicant for patent or its grantors. Therefore, the appellant will be allowed a period of 60 days from the receipt of this decision to submit such proof failing in which the decision below holding the application for rejection will be allowed to stand.

The decision below, as modified herein, is affirmed.

Bradley-Turner Mines, Inc. is allowed the right of appeal from this decision to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken to the Secretary, it must be filed in the office of the Director, Bureau of Land Management, Washington 25, D. C., within thirty days from receipt of this decision. The amount of the filing fee is $5.00 for each mining claim included in the appeal. In taking an appeal there must be strict compliance with the regulations.

Earl J. Thomas

Acting Director

Enclosure

DISTRIBUTION:

Mr. Charles Gilmore, Attorney at Law (Certified Mail)
Mr. George Dopplmaier (Regular Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

appeal to Sec
affirmed A-28725 8-30-61

DOCKET FILES

LEASABLE MINERALS (Other than Oil and Gas) * 5 Sodium

A sodium prospecting permit application for lands included within a desert land entry not impressed with a sodium reservation is properly rejected where the lands are found to be not prospectively valuable for sodium. In the absence of a conflicting entry such a permit may be granted for public lands not prospectively valuable at the discretion of the Geological Survey. The findings of the Geological Survey that the lands are not prospectively valuable, in the absence of convincing evidence to the contrary, are binding upon the Bureau of Land Management.

Barbara R. Gale, Los Angeles 0162492 (September 30, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
Los Angeles 0162492
5.04g

September 30, 1960

Certified Mail
Return Receipt Requested

DECISION

Barbara R. Gale : Sodium Prospecting Permit Application

Decision Vacated; Case Remanded

Mrs. Gale has appealed from a decision of the Chief, Mineral Adjudication Unit, Los Angeles Land Office dated April 22, 1960 which rejected her above-identified application filed on January 29, 1959 under the provisions of section 23 of the Mineral Leasing Act (30 U.S.C. 1958 ed., sec. 261-263), for the reason, as stated in the decision, that the Geological Survey report does not indicate there is any prospective value for sodium in the lands applied for. The record shows that part of the lands sought are in outstanding desert land entries.

The applicant has based her appeal on information contained in California Division of Mines Bulletin 95, 1925, and Bulletin 160, 1957. She states that ". . .there are ulexite cotton balls in Koehn Lake, which are on land that before the movement of the south sliver of the Garlock fault was within a mile of the present property" and ". . .mineralization of the Randsburg district which is in part at least contemporaneous with and is probably related to the borate mineralization, has long been known and can be traced practically up to the old fault (the fault which trends north-east along the foot of the Rand Mountains)." She then concludes "thus the present property is between an indicated and a known mineralization only three or four miles apart."

By a supplemental report dated August 22, 1960 after consideration of the appellant's statements the Geological Survey states that the mineralization referred to in the Rand Mountains although possibly contemporaneous with the borate mineralization in Koehn Lake is unquestionably not related to it. The ulexite "cotton balls" formed above the moist part of the lake bed. The borates from which the ulexite is derived were probably carried into the lake basin by the movement of ground water. T. W. Diblee states on page 43 of "Geology of the Saltdale Quadrangle, California," California Division of Mines Bulletin No. 160, 1952, that "The undrained basin of Cantil Valley below the 2,000 foot contour was a shallow lake during late Pleistocene. . ." The land applied for ranges in elevation from over 2,050 feet to over 2,225 feet. Although it is possible that buried playa deposits may exist at depth, no information is available to verify an assumption that the sediments in the area of the requested land contain any sodium deposits.

Therefore, a modification of the Geological Survey's previous report is not warranted. The lands in the application are still properly classified as not prospectively valuable for sodium. However, the Geological Survey reports that they have no objection to the issuance of a sodium prospecting permit for the lands not conflicting with desert land entries.

A mineral prospecting permit embracing lands included in outstanding desert land entries cannot be granted, unless the entries were impressed with mineral reservations. See, Bertram N. Beal, 51 L.D. 162 (1925). 30 U.S.C., Sec. 121-124 provides for the reservation of Sodium in desert land entries; however an entryman cannot be required to consent to such a reservation where the land is determined to be not prospectively valuable for sodium. The Geological Survey having considered all the evidence submitted by appellant has reported that the lands are not prospectively valuable for sodium; therefore, it is necessary to reject the mineral prospecting permit application as to the entered lands. Cf. Irma Gregg, A-27344 (August 9, 1956) and Bertram N. Beal, supra; H. Stanton Hill, A-28092 (December 1, 1959).

As to the lands sought not embraced in desert land entries, the decision appealed from is vacated. When this decision becomes final the case file will be remanded to the Manager, through the Assistant to the State Supervisor at Los Angeles, for further consideration and the issuance of a permit on available lands, all else being regular.

Mrs. Gale is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mrs. Barbara R. Gale (Certified Mail)
Mineral Staff Officer (3)
Geological Survey (3)
Appeals List No. 1
EG

appeal to Sec
Dismissed; case remanded
A-28733
5-18-62

DOCKET FILES

MINING CLAIMS * 16 Application for Patent

Where an adverse suit has been initiated against mining claims under patent application the application will be held suspended until a certified copy of the judgment roll rendered in such suit is filed in the Land Office.

Hines Gilbert Gold Mines Company et al., Sacramento 054081 (October 20, 1960)

DOCKET FILES

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento 054081
5.04g
October 20, 1960

DECISION

Hines Gilbert Gold Mines Company : Mineral Patent Application

John D. Francisco, Helen A.
Francisco and Fred I. Green,
Adverse Claimants -
Protestants

Application Suspended and Case Remanded

Mr. and Mrs. Francisco and Mr. Green protested the mineral patent application, Sacramento 054081 of the Hines Gilbert Gold Mines Company. Adverse suit having been initiated, further processing of the application was suspended. Thereafter, on April 15, 1960, decision was rendered noting termination without prejudice of adverse suit in Civil Action No. 7687 in the United States District Court for the Northern District of California, Northern Division. By a decision of the same date, as amended on May 6, 1960, final certificate of mineral entry was issued and patenting of the mining claims listed in the application was approved. The protestants have appealed to this office from the actions taken.

The record shows that Civil Action No. 7687 was dismissed without prejudice and that thereafter the Franciscos and Green initiated action to quiet title to the claims in the State court and that action in the State Court is still pending.

Although the pending suit was not initiated during the period of publication (see 30 U.S.C. sec. 29 and 30), it appears to be a direct outcome of the earlier suit in the District Court, and determination of the issues therein may affect the mineral patent applicant's right to patent. Therefore, pending the final outcome of the pending suit no further action shall be taken concerning mineral patent application 054081 until there is filed in the Land Office a certified copy of the judgment roll. Upon receipt of the judgment roll the record will be reviewed and decision rendered by the Land Office concerning the rights of the parties and the patent application shall be further processed in the light of such determination.

1/ Moreover, even if the court proceedings are not such as come under R.S. sec. 2326 (30 U.S.C. 30), the Department may as a matter of grace suspend its proceedings on the application for mineral patent to await the result of a pending suit involving the right of possession to the mining claim. Christmann v. Yonkers, 56 I.D. 34 (1936); Black Mica Mines, Inc., et al., A-22969 (July 28, 1941).

The case record is returned through the Bureau's State Supervisor at Sacramento for further handling in accordance with the instructions contained therein.

Edward Woozley
Director

DISTRIBUTION:

SS (Sacramento) w/case record Sacramento 054081
Gilmore & Gilmore, Attorneys for Hines Gilbert Gold Mines Co. (Regular Mail)
Landis & Martin, Attorney for Mr. & Mrs. Francisco (Regular Mail)
Mr. & Mrs. John D. Francisco (Regular Mail)
Mr. Fred I. Green (Regular Mail)
Minerals Staff Officer (3)
Appeals List No. 1
BF

appeal to Sec
affirmed A-28754
7-31-62

DOCKET FILES

MINING CLAIMS * 5 Discovery

The mere presence of gold on a placer mining claim located for gold does not satisfy the requirement of the discovery of a "valuable mineral deposit" under the mining laws where it is shown that the amount of gold present is extremely limited and would not warrant a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in developing a paying mine.

A mining claim is null and void where, although valuable minerals may have been extracted in the past, it is not shown as a present fact that the claim is valuable for minerals.

An applicant for a mining patent has the burden of proving in a contest against his claim that a discovery has been made within the limits of the claim.

A discovery made subsequent to a withdrawal of lands will not serve to validate a claim located prior to the withdrawal.

There is no presumption as to the validity of a mining claim merely because it was located many years ago.

Each 10 acre subdivision of a placer mining claim must be mineral in character; where a 10 acre subdivision is nonmineral in character the claim, insofar as such subdivision is concerned, is invalid.

U.S. v. Humboldt Placer Mining Company and Del deRosier.
Contest 10-2, Sacramento 049136 (California).

(October 28, 1960)

In reply refer to:
Contest 10-2 (Sacramento)
Mineral Patent Application -
Sacramento 049136
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

October 28, 1960

Certified Mail
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DECISION

United States		Dyke and Curliss Placer Mining
v.	:	Claims situated in secs. 7 and 8,
Humboldt Placer Mining Company	:	T. 34 N., R. 8 W., M.D.M.,
and Del deRosier	:	California
	:	

Decision Affirmed

Humboldt Placer Mining Company and Del deRosier have appealed from a decision of the Hearing Examiner, dated February 15, 1960, declaring the Dyke and Curliss Placer Mining claims null and void. The claims were each declared invalid for lack of discovery.

The appellants contend that the decision is contrary to law and the weight of the evidence. They also assert that the Hearing Examiner was biased and prejudiced in favor of the Bureau of Land Management.

The Dyke and Curliss were located in December 1896 on lands then subject to mineral appropriation. The lands in sec. 8 and covered by the Curliss were included in Reservoir Site #17 of June 8, 1926, a First Form Reclamation Withdrawal of November 16, 1932, and Power Site Classification #267 of August 24, 1933. On February 27, 1952 the remaining lands in the Curliss, situate in sec. 7, were included in a First Form Reclamation Withdrawal. The $E\frac{1}{2}SW\frac{1}{4}$ sec. 7, covered by the Dyke, was included in Reservoir Site #17 and Power Site #267; all the land within the Dyke was included in the Reclamation withdrawal of February 27, 1952, 17 F.R. 1976.

Mineral Patent Application, Sacramento 049136, including among others, the Dyke and Curliss claims, was filed on November 19, 1954. The Land Office, by decisions of January 4, 1955 and January 25, 1957 requested additional factual data in accordance with 43 CFR Part 185. All the lands involved are within the Trinity Project Development of the Bureau of Reclamation and are included in eminent domain proceedings.

The complaint in Contest 10-2 charged that the land embraced by the claims is nonmineral in character and that the claims each lack valid discoveries.

A mining claimant has the ultimate burden of establishing by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F. 2d 836 (D.C.Cir. 1959). It follows that the appellants by the very filing of their patent application indicated that they were ready to establish the validity of discoveries within the limits of their claims antedating the withdrawals. U.S. v. Everett et al., A-27010 (October 17, 1955); Cameron v. U.S., 252 U.S. 450 (1920). By the filing of that application the appellants represented the claims to be valuable for the valuable mineral deposits contained therein at the present time. 30 U.S.C. secs. 22 and 23; U.S. v. Houston, 66 I.D. 161 (1959). It was also held in the Houston case that it is the duty of the applicant to keep discovery points available for inspection by the Government mineral examiners.

Consonant with the above statement the regulations provide: -

> "* * *The application should contain a full description of the kind and character of the vein or lode and should state whether ore has been extracted therefrom; and if so, in what amount and of what value. It should also show the precise place within the limits of each of the locations embraced in the application where the vein or lode has been exposed or discovered and the width thereof. The showing in these regards should contain sufficient data to enable representatives of the Government to confirm the same by examination in the field and also enable the Bureau of Land Management to determine whether a valuable deposit of mineral actually exists within the limits of each of the locations embraced in the application." 43 CFR 185.53.
>
> "In placer applications, in addition to the recitals necessary in and to both vein or lode and placer applications, the placer application should contain, in detail, such data as will support the claim that the land applied for is placer ground containing valuable mineral deposits not in vein or lode formation * * *. If the claim be for a deposit of placer gold, there must be stated the yield per pan, or cubic yard, as shown by prospecting and development work, distance to bedrock, formation and extent of the deposit, and all other facts upon which he bases his allegation that the claim is valuable for its deposits of placer gold* * *." 43 CFR 185.71(a).

In the face of the very definite requirements of the regulations the appellants said absolutely nothing concerning the minerals or workings in section 8 and but tangentially referred to the land in section 7 (page 14 of the application) thusly:

> "Section 6, 34 N., 8 W: The old workings in Smith Gulch averaged 15 cents to 35 cents per cubic yard. The entire gulch and south half of this section is covered with gravel of undetermined depth. COMMENTS; the sections immediately above, that is, the south half of Section 10 and all of Sections 11, 12, 13, 14, 24 and the south half of Sections 6, 34 N., 9 W., and all of Sections 7 and 18, 34 N., 8 W., are in Buckeye Basin drainage area. In this basin is the largest area of the combined properties covered with gravel. Buckey Creek drains the whole Buckeye Basin. This creek was worked in the early days and in many localities has been reworked with recoveries frequently running several dollars per yard. There is ample fall in the grade of this creek for disposal of tailings."

The appellants failed to comply with the regulations or remedy the deficiencies in their application as required by the January 1955 and 1957 decisions. The application was subject to rejection for that reason alone.

The testimony and evidence adduced at the hearing is accurately summarized by the Hearing Examiner. In brief, the Government mineral examiners testified that over a period of many months they had sampled the gravels at regular intervals from the surface to bed rock and from their measurements had estimated the quantity of gravels within the claims. Their testimony showed that the claims had been worked in the past. The worked areas showed traces of minerals of such low value that the examiners were of the opinion that a prudent man would not be justified in reworking those areas. The virgin soil amenable to mining within the Dyke was described as contained within three areas. The first comprized 1581 cubic yards of which a total gross recovery would be $246.20; the second area of 375 cubic yards with an expected recovery of $71.50 and the third area of 44 cubic yardswith an expected recovery of about $9.20. TR 56-63. The minable virgin area within the Curliss was shown to be 600 cubic yards assaying at 30.5 cents; a second area of 3350 cubic yards of a total extractable value of less than 10 cents per cubic yard. TR 76-80. These values are gross and do not reflect the costs of mining including stripping of the overburden.

The appellants' witnesses, in substance, testified they had taken samples at bed rock or as close thereto as possible, that samples had been taken in the holes or trenches dug by the Government examiners or others or in trenches which had been cut by the Bureau of Reclamation; some samples had been taken from freshly dug areas or from alleged waste piles. The assay values of such samples were translated and ascribed as the value of all asserted gravels found in both the virgin and previously worked areas. Mr. Taylor estimated 30,500 cubic yards of minable matter remained within the Dyke and 36,940 cubic yards within the Curliss, the average value of such materials being in excess of $1.00 per cubic yard. TR 519-532.

Mr. deRosier, in his own behalf, testified that he is a real estate salesman, that he acquired a one-half interest in the properties in 1952 and his work in connection with the claims -- "I had to orient myself in there, but all I have done is put in roads, and tested gravels in areas, and ran property lines to locate corners for my own information." He went on to say his tests of material consisted of "only hand-panning without any assays or anything just to -- and I ran a road into Smith Gulch * * *." TR 543.

Were the mining claimants to prevail in this proceeding, it was obligatory for them, at the hearing conducted, to establish the claims had been validated by discovery prior to withdrawal, that each 10 acre subdivision is mineral in character (30 U.S.C., sec. 36; 43 CFR 185.26) and that the claims are presently valuable for the mineral deposits contained therein. And there is no presumption of the validity of a mining claim merely from the fact that it has been subsisting for many years in cases where the United States is challenging the validity of the claim. U. S. v. Jesse Edwards, A-28145 (January 20, 1960).

The testimony of the Government witnesses established, prima facie, that certain 10 acre subdivisions within the two 160 acre claims involved, contain no placer material at all and that the material in the remaining acreage was of such small quantity and low values that a prudent man would not be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine on either of these two claims. Thus did the contestant make its case - that a valid discovery was not demonstrated on either of the two locations. See Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905).

The appellants, after the Government's presentation, apparently proceeded on the theory that earlier workings on the claim and the age of the locations were sufficient to establish their validity. They introduced no evidence to demonstrate an existing discovery on February 27, 1952 (at which time all the lands covered were effectively withdrawn). Even though Mr. deRosier had, by the very filing of the patent application, represented that he was ready to demonstrate a valid subsisting discovery at the date of filing, he testified that he had to "orient" himself and had gone no further than the testing of gravels, without assays, within the limits of the claims. Apparently, the "discoveries" upon which he relied were based on the past history of the claims - not on knowledge of the present values contained therein.

Assuming, for the purpose of this decision, that the claims had been validated by discoveries prior to any withdrawal, if those discoveries were lost for any reason whatsoever, by depletion or otherwise, the claims would, nevertheless, be without present validity. Waskey v. Hammer, 223 U.S. 85 (1912); U.S. v. Eric North, A-27936 (July 1, 1959).

The appellants described no discovery points in their patent application, they described no areas of working pits, they failed to describe minable areas or the values remaining, they failed to describe the mined-out areas or the value of past recoveries. Even in the glare of these deficiencies, the Bureau' mineral examiners went upon the land - not to rehabilitate discovery points which the appellants were under obligation to identify and make available for inspection - but to examine the areas suggesting the likelihood of encountering gold values. It was not their duty to make a "discovery" for the appellants,[1] but with thoroughness they sampled the lands at regular intervals to determine whether they contained minerals of value. On the basis of their examination the mineral experts testified as to the assay values and extent of the gravels, the maximum possible recovery from those gravels (exclusive of mining costs) and were of the opinion that the values remaining in the lands do not justify labor or means in an attempt to wrest those values from the earth.

The appellants in presenting their case did not rely on demonstrations of alleged discoveries made prior to withdrawal. Relying on the months of tedious exploration work by the Government mineral experts, they want in after them and sampled at bed rock. Then, with mere assertions and "belief" that all the gravel areas, including the worked areas, bear the same values as at bed rock they "estimated" the cubic yardage and value of the remaining alleged gold bearing gravels. It appears, then, that the appellants, with no knowledge of valid discoveries prior to 1952, are attempting to validate their claims by alleged discoveries made after the lands were withdrawn. Aside from the withdrawals, and similarly as did the Examiner below, we believe the estimates of quantity and the value of gravels by the appellant's witnesses to be sheer conjecture not based on fact; we believe the testimony of the examiners, based on exacting studies gained by actual measurements, assays and other field work, is entitled to full credibility and far outweights the probative value of that presented in behalf of the appellants.

Uncontroverted evidence shows that placer material within the Curliss is contained only in 60 acres, i.e., the NW¼NE¼ NE¼, SE¼SE¼NE¼ sec. 7, the S½ NE¼NE¼, NE¼NW¼NW¼ and the NW¼NE¼NW¼ sec. 8; the Dyke contains placer material only in the E½SE¼SW¼, the SE¼NW¼SW¼ and the NW¼SW¼SW¼ sec. 7(40 acres). The remaining 10 acre subdivisions of these claims bear no placer deposits and are not subject to placer location, the claims as to such subdivisions are null and void for that reason alone. The mere presence of gold in any of the areas of the claims does not satisfy the requirement of discovery of a "valuable mineral deposit" under the mining laws where it is shown, as in this case, that the amount of gold present is extremely limited and would not warrant a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in developing a paying mine. U. S. v. Carnes, A-28178 (May 23, 1960); Helen V. Wells et al., 54 I.D. 306 (1933). The claims, therefore, are null and void in their entireties.

The record fails to disclose a scintilla of evidence to substantiate appellants' assertion of bias or prejudice on the part of the Examiner. On the contrary, it appears to us that the Examiner was liberal in allowing time so the appellants could present all evidence thought material by them and to allow them to make further showings of discovery after the close of the hearing without additional cost to them. We note the Examiner was duly appointed in accordance with the provisions of the Administrative Procedure Act and that he is independent of the Bureau. The hearing was conducted in accordance with prescribed practice and procedure; the decision reflects a full consideration only of the evidence adduced at the hearing. See United States v. O'Leary et al., 66 I.D. 17 (1959), 63 I.D. 341 (1956). There is no merit to the assertion of undue delay in promulgation of the decision or of the assertion that the Examiner rendered his decision after "consultation with others in the Department of the Interior outside the record in this case." The conclusions in the decision below are well supported by the evidence.

---

[1] See U.S. v. Hunt, A-28189 (February 29, 1960); U.S. v. Edwards, supra.

Accordingly, the decision of the Hearing Examiner is affirmed.

The appellants herein are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $10.00. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is :

Regional Solicitor
Department of the Interior
P. O. Box 4291
Sacramento, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Charles L. Gilmore, Attorney at Law (Certified Mail)
Humboldt Placer Mining Company
Mr. Del DeRosier
Regional Solicitor
Hearing Examiner John Wood
Hearings Administrative Officer
Minerals Staff Officer (4)
Appeals List No. 1
BF

DOCKET FILES

MINING CLAIM * 1 Generally (Verified Statement)

A mining claimant who has located an unpatented mining claim prior to the passage of the Act of July 23, 1955, and who fails to file a verified statement within 150 days of the first publication of notice that the filing of such a statement is required, shall be conclusively deemed to have relinquished all rights to the use of the surface of the mining claim inconsistent with the uses permitted by the statute.

Sam Terzich et al., Sacramento PL 45-17 etc. (November 2, 1960)

In reply refer to:
Sacramento PL 45-17
45-18
45-19

November 2, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

DECISION

Sam Terzich and Milo Terzich, :
a.k.a. Milos Terzich : Mining Claims
:
Mark Kovich and Louise Wright :
:

Manager's Decisions Affirmed

Appeals have been taken by the above-named individuals from decisions dated February 5, 1959, holding that verified statements which they had filed pursuant to section 5 of the Act of July 23, 1955 (30 U.S.C., 1952 ed., Supp. V, sec. 613), for the purpose of asserting their rights to the surface resources on various unpatented mining claims located prior to the enactment of the cited law, were not filed timely. These decisions rejected the verified statements and held that the statutory period of 150 days within which the verified statements could have been accepted (in accordance with the Notice to Mining Claimants, published in the Feather River Bulletin, Quincy, California, beginning June 5, 1958), expired on November 3, 1958, and that the verified statements were filed for record on December 29, 1958; consequently, for failure to file the statements timely the claims are subject to the limitations imposed on mining claims located after July 23, 1955, by section 4 of the Act (30 U.S.C., 1952 ed., Supp. V, sec. 612).

The appellants do not deny that the statements were not filed timely. In the appeals and in a brief in support thereof it is contended that the delay was due to an oversight on the part of their attorney (this is confirmed by the attorney), that the mining claimants acted in good faith and without negligence in the submission of the verified statements, and that section 5 of the above-cited law is unconstitutional in that it deprives the claimants of vested rights in the mining claims without due process or just compensation.

The express language of the statute is that the failure to file the verified statement within 150 days after the first publication is conclusively deemed a relinquishment of certain rights to use the surface. It is beyond the authority of this Department to deviate from the clearly expressed will of Congress. Since the verified statements were not filed within the 150-day period, the appellants must be deemed to have relinquished the right to use the surface of the mining claims in a manner inconsistent with the Act of July 23, 1955, supra.

The appellants are not correct in their statements that they have been deprived of their right to use the surface resources on the unpatented claims without due process of law. While the Act limits the uses which may be made of the surfaces of mining claims located after the date of the passage of the Act, it provides in addition a procedure whereby persons who have made mining locations before the date of the Act must, when called upon to do so by a published notice, assert their rights to the use of the surface. Persons not timely asserting their rights to the use of the surfaces of mining claims also subject their claims to the limitations of the Act. Failure to timely assert such rights is conclusively deemed a relinquishment of rights to use the surface of the mining claims in a manner inconsistent with the Act.

The Manager's decisions were correct, and they are hereby affirmed.

The rejection of the verified statements limits the degree to which, prior to patent, the land may be used for nonmining purposes. If and when patent should be issued for any mining claim, the restrictions resulting from the failure timely to file a verified statement are no longer operative, and a mining claimant then acquires full right to use the surface as well as the mineral resources of the land.

Messrs. Sam and Milo Terzich and Mr. Mark Kovich and Miss Louise Wright are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations. A filing fee of $5.00 is required in connection with each mining claim involved in an appeal.

If the above individuals appeal, then the adverse party to be served is:

Chief, Forest Service
U. S. Department of Agriculture
Washington 25, D. C.

Edward Woozley

Director

Enclosure

Distribution on page 3

DISTRIBUTION:

Mr. Sturgis B. Whitwell, Attorney at Law (Certified Mail)
Mr. Sam Terzich (Regular Mail)
Mr. Milo Terzich (Regular Mail)
Mr. Milo Terzich (Regular Mail)
Mr. Mark Kovich (Regular Mail)
Miss Louise Wright (Regular Mail)
Minerals Staff Officer (5)
Geological Survey (3)
Regional Forester, Forest Service, U.S.D.A., Sacramento (3)
Mr. John Sieker, Forest Service, U.S.D.A. (8)
Appeals List No. 1
FAP

DOCKET FILES

MINING CLAIMS * 1 Generally

The 150-day statutory period in which to file a verified statement under the Act of July 23, 1955, is the maximum time allowable for such purpose and it may not be extended.

National Youth Foundation, Sacramento 060347-Z(1-3)PL 167

(November 3, 1960)

In reply refer to:
Sacramento 060347-Z (1-3)PL 167
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

November 3, 1960

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DECISION

National Youth Foundation	:	Verified Statement under the Act of July 23, 1955 ([illegible]. (30 U.S.C. 613(a))

Decision Affirmed

The National Youth Foundation has appealed from a decision of August 18, 1960, rejecting its verified statement filed on June 24, 1960, in purported compliance with the Act of July 23, 1955. The statement was rejected for the reason that it was not timely filed within 150 days from the date of the first publication of notice that the filing of such statement was required.

The area wherein the claims listed in the statement are situated was first published on January 21, 1960. The 150th day thereafter was June 19, a Sunday; a filing made on Monday, June 20, would be acceptable. However, the appellant's statement was executed on June 19 and thereafter filed on the 155th day after the first publication.

The appellant concedes the statement was not timely filed but recites that it was mailed in time to be timely received and certain other mitigating circumstances concerning the cause of the late filing.

The Department has held that the 150-day statutory period in which to file under the Act of July 23, 1955, is the maximum time allowable for such purpose, that such period may not be extended by the Department and that a verified statement required under the act is properly rejected and the mining claim (use of surface resources) is subject to the terms and limitations of section 4 of the act where the required statement is not timely filed. Hines Gilbert Mines Company, 65 I.D. 481 (1958). It was further held in Mary E. Poast, A-27968 (July 22, 1959), that a verified statement under the act is not "filed" until such time as it is actually received in the office where the filing is required, and where the statement is deposited in the mail prior to but is not received until after the 150th day, the statement is not timely filed and must be rejected.

Accordingly, the decision appealed from is affirmed.

National Youth Foundation is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be $5.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Robert P. Wilson, President, National Youth Foundation (Certified Mail)
Mr. John Sieker, Forest Service (Regular Mail)
Minerals Staff Officer (5)
Appeals List No. 1
BF

appeal to Sec.
affirmed in Part
Reversed " "
A-28763 6-4-63

LO

DOCKET FILES

MINING CLAIMS * 5 Discovery

To constitute a discovery of a valuable mineral there must be shown an exposure within the limits of a claim of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine ; for minerals of widespread occurrence such as sand and gravel, it must be shown that the deposits can be extracted, removed and marketed at a profit.

Where deposits of sand and gravel are of commercial quality and quantity and are shown to have been extracted, removed and marketed at a profit prior to July 23, 1955 and are similarly marketable at present, a valid discovery is demonstrated.

United States v. Charles H. Henrikson et al., Contest No. 5513 (Sacramento)

(December 2, 1960)

LO

In reply refer to:

Contest No. 5513 (Sac.)
Sacramento 054559
(Mineral Patent Applicatio
5.04g
December 2, 1960

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Certified Mail
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DECISION

United States : Squaw Valley Gravel and Squaw
v. : Creek Placer Mining Claims
Charles H. Henrikson and : situated in sec. 28, T. 16 N.,
Oliver M. Henrikson : R. 16 E., M.D.M., California

Decision Affirmed

The Forest Service has appealed from the Hearing Examiner's decision of October 30, 1959 holding valid, by reason of discovery the Squaw Valley Gravel Placer mining claim covering the NW¼NW¼NE¼SE¼, N½NE¼NW¼SE¼ and the NE¼NW¼NW¼SE¼ sec. 28, and the Squaw Creek Placer covering lands in the S½NE¼NE¼SE¼, S½NW¼NE¼SE¼, S½NE¼NW¼SE¼ and the S½NW¼NW¼SE¼ sec. 28.

The complaint against the mining claims initiated upon the protest of the Forest Service to mineral patent application, Sacramento 054559, charged that:

"(a) The land is non-mineral in character;
(b) Minerals have not been found within the limits of each claim in sufficient quantity to constitute a valid discovery;
(c) The claims do not conform with the United States system of public land surveys;
(d) $500 worth of labor has not been expended nor improvements made upon Squaw Creek Placer Claim."

A hearing on the charges was conducted on July 23-25, 1959, The testimony adduced is accurately summarized in the decision below; only so much as is not summarized therein or as is pertinent to this decision will be noted here.

The Squaw Valley claim was originally located on August 15, 1949; it is rectangular in shape and approximately 330 feet by 1320 feet and covers 10 acres. Contiguous thereto on the south is the Squaw Creek claim; it is rectangular in shape approximately 330 feet by 2640 feet and covers approximately 20 acres. The Squaw Creek was located on March 6, 1953. Both claims were located for the alleged valuable deposits of sand and gravel contained therein. The claims run along and cover parts of State Route 38 and the main road from route 38 into the Squaw Valley Recreation area where the 1960 Olympic Games were held. They are within the Lake Tahoe National Forest.

The Forest Service showed that private lands north of the Squaw Valley claim were previously worked for their sand and gravel but those deposits have been mined out. It introduced evidence to show that the Henrikson claims are in a fringe area to the previously mined deposits and that the contestees have depleted the fringe deposits. It showed that the Squaw Creek claim never had been commercially operated and introduced evidence to show that although there were visible evidences of sand and gravel on that claim, commercial quantities within the limits of that claim are nonexistent and could not be anticipated to be found thereon.

The Forest Service also introduced testimony to the effect that the lands covered by the claims are very desirable and valuable in conjunction with the recreation area and that sand and gravel operations on these lands do not conform with the overall proposed use thereof and should the lands be patented the local zoning authorities would take steps looking to the cessation of mining activities on these lands. (Tr. 44-61)

The mining claimants clearly showed that they, since 1949, had established a highly successful sand and gravel operation on the Squaw Valley and they had worked that claim at a profit. They showed that sand and gravel was in increasing demand in the locality. They introduced evidence showing the deposits were not worked out, that the Squaw Creek was located for reserve deposits and that the occurrences and showings of sand and gravel therein establish the commercial value of that claim for mining purposes. Other evidence introduced established to a certainty that monies in excess of $1,000 had been expended for common improvements of the two claims.

The Examiner, on the evidence of record, found the Henriksons had demonstrated that the materials from both claims were marketable at a profit prior to July 23, 1955, and are presently marketable. He found that sufficient materials remain and exist within the limits of the claims to justify further exploitation. He also found the locations conform with the system of public land surveys and that expenditures for permanent improvements in excess of $500 had been made for the benefit of each claim. He concluded that the claims had been validated by discovery and directed further processing of the patent application in accordance with pertinent law and regulations.

The Forest Service in its Reasons for Appeal, stated in material part as follows:

> "These two claims are situated at the mouth of Squaw Valley, in the Tahoe National Forest, in California, north of Lake Tahoe. The more northerly claim, Squaw Valley Gravel, comprising ten acres, runs east and west along side the road into the valley. It has on it a gravel pit which in years past has been actively worked. The southern claim, the Squaw Creek claim, comprising twenty acres, parallels and adjoins the other claim. No active gravel pit has ever been located on it. * * *
>
> " * * *The Government's case rests on four main arguments, as follows:
>
> "(1) On the Squaw Creek claim there has been no discovery of valuable sand and gravel with demonstration of its profitable marketability. Furthermore, even if contestees have succeeded in finding sand and gravel on this claim and in demonstrating its value, they did not do so until after July 23, 1955, when, by reason of Public Law 167, such common materials were no longer subject to location.
>
> "(2) The Squaw Valley claim has been mined out so that any discovery that might heretofore have been made has been lost.
>
> "(3) The claims have been laid out in terms of $2\frac{1}{2}$-or 5-acre legal subdivisions. If there is a discovery anywhere on the claims (which the Government denies), the claims are valid only as to the $2\frac{1}{2}$-or 5-acre portion on which the discovery lies.
>
> "(4) The claims do not conform to the public land surveys in that they are long, narrow parcels wholly unrelated to the usual square land subdivisions. * * *
>
> * * *Actually, the most that contestees' evidence proves is that Squaw Valley sand and gravel enjoys a presently-existing market. It does not show that any other claim, including, of course, the Squaw Creek claim, enjoys this status. * * *Thus, unless somewhere in the record there is proof of the existence of another sand-and-gravel deposit in this claim, we are entitled to assume /emphasis added/ that the claim has been mined out * * *."

Its appeal, then, is based on the contention that the Examiner's decision is contrary to law and the weight of the evidence.

The appellant has not alleged error in the dismissal of charge "d". Concerning charge "c", that the claims do not conform with the system of public land surveys, the appellant, in effect, asserts that each of the claims is a "shoestring" location and located in violation of the statutory mandates of 30 U.S.C. sec. 36, providing that all placer claims shall conform as near as practicable with the United States system of public-land surveys and the rectangular subdivisions of those surveys. Ordinarily the smallest legal subdivision under the statute is 10 acres.

Concerning the conformity of placer mining claims to the public land survey it is provided in 43 CFR 185.28 as follows:

> "(b) Conformity to the public-land surveys and the rectangular subdivisions thereof will not be required where compliance with such requirement would necessitate the placing of the lines thereof upon prior located claims or where the claim is surrounded by prior locations.
>
> * * *
>
> "(d) Whether a placer location conforms reasonably with the legal subdivisions of the public surveys is a question of fact to be determined in each case, and no location will be passed to patent without satisfactory evidence in this regard. Claimants should bear in mind that it is the policy of the Government to have all entries whether agricultural or mineral lands as compact and regular in form as reasonably practicable, and that it will not permit or sanction entries or locations which cut the public domain into long narrow strips or grossly irregular or fantastically shaped tracts. (Snow Flake Fraction Placer, 37 L.D. 250 /1908/)."

On the north these claims are bounded by patented lands; the other lands surrounding the claims are not shown to be mineral in character. And there is no requirement that a mining claimant include within the boundaries of a claim land that is worthless for mining purposes. The facts fully support the finding that these locations were made in compact and as regular form as reasonably practicable in conformity with the system of public land surveys.

We turn now to inquire whether the claims are valid by reason of discovery prior to July 23, 1955 and whether a discovery exists today.

To constitute a discovery of a valuable mineral there must be shown an exposure within the limits of a claim of minerals of such character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine; and, in addition, for minerals of widespread occurrence such as sand and gravel, it must be shown that the deposits can be extracted, removed and marketed at a profit. Foster v. Seaton, 271 F 2d 836 (D. C. Circuit, 1959). Corollary thereto is the well established principle that even if a claim was previously valuable for the deposits therein, but is not presently valuable, i.e., that discovery has been lost for any reason whatsoever (depletion, lack of present marketability or otherwise), the claim is without validity. Gwillam v. Donnellan, 115 U.S. 45 (1885); United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161 (1959).

In the first cited paragraph in the reasons for appeal the appellant admitted the Squaw Valley Gravel Claim "has on it a gravel pit which in years past has been actively worked." The evidence of record clearly shows this pit was actively worked at a profit long before the passage of the act of July 23, 1955. The marketability of the deposits and the bona fides of location prior to that date are not seriously questioned by the appellant. But it seems to be appellant's contention that the discovery of previous years has been lost because of depletion of resources. Gainsaying its own argument concerning depletion it continues - "the most that contestees' evidence proves is that Squaw Valley sand and gravel enjoys a presently-existing market."

The burden of proof to establish the validity of the claims is upon the minera patent applicants. They showed the Squaw Valley claim had been worked at a profit in the years past for the sand and gravel therein contained; they showe the present market for those materials and that the market is now being suppli and is capable of being supplied from the present operating pit. They showed that sufficient materials remain existent in the claim to justify further exploitation. Even if the deposits are of poor quality, as contestant's evidence tends to show, the fact remains that the mining claimants have the equipment on site to economically process the materials in commercial quality and in commercial quantity and market them at a profit. Even though the Clements plant at Truckee might be able to process all the known deposits on these claims in but a few days, the Henriksons clearly demonstrated that they are at present successfully operating their pit at a profit, and that the deposits will sustain such operations far into the future. Since there is a sand and gravel deposit presently sustaining a profitable mining operatio on the Squaw Valley Gravel claim we find absolutely no justification "to assume that the claim has been mined out." Any assumption of depletion has no basis in law and is belied by the facts presented; we are bound by thos facts and the applicable law. We will not "assume" in derogation of the established rights of the mineral claimants.

The contestant's evidence indicates that it could not with a great degree of certainty ascertain the extent of the deposits on the Squaw Creek claim. But the preponderance of evidence demonstrates deposits of commercial quality and quantity on the Squaw Creek and that a prudent man (both prior to July 23, 1955 and today) would be justified in the further expenditure of labor and means in extending the successful Squaw Valley operations to the Squaw Creek, with a reasonable propsect of success in developing the latter property into a paying mine. And contestant's argument that there must be a going operation on the Squaw Creek prior to July 23, 1955 is without persuasion. Absent a going operation it is sufficient to show that the materials could then and can now be extracted, removed and marketed at a profit. See United States v. Seeley and Lopez, A-28127 (January 28, 1960).

The evidence of record fully supports the Examiner's Findings that the Squaw Valley Gravel Placer and Squaw Creek Placer mining claims were validated by discovery prior to July 23, 1955, that there are presently existing within the limits of each claim sand and gravel deposits of commercial quality and quantity, and that those deposits were and now are susceptible of extraction, removal and marketing at a profit. His decision is affirmed.

The Forest Service is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken there must be strict compliance with the regulations.

In the event of an appeal the adverse parties are to be served through their attorneys.

Nagle & Vale
Attorneys at Law
300 Benjamin Franklin Court
San Meteo, California

Edward Woozley
Director

Enclosure

DISTRIBUTION:
Office of the General Counsel, Department of Agriculture (Certified Mail)
Nagle & Vale, Attorney at Law (Regular Mail)
George W. Coleman, Attorney at Law
Messrs. Charles H. Henrikson and Oliver M. Henrikson
Mr. Rawleigh L. Tremain, Forest & Lands Div. (2)
Mr. John Sieker, Forest Service, U.S.D.A. (8)
Hearing Examiner, John A. Wood
Minerals Staff Officer (5)
Hearings Administrative Officer
Appeals List No. 1
BF

In reply refer to:

Los Angeles
0161572 through 0161576
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

Decmber 9, 1960

DOCKET FILES

DECISION

American Potash & Chemical :
Corporation :
Stauffer Chemical Corporation, :
Lease Applicants; appellees :
:
and :
:
Leroy G. Black and :
Searles Lake Chemical Company, :
Protestants; Appellants :

Competitive Sodium Leases;
Searles Lake, California.

Decision Affirmed; Protests Dismissed

Mr. Black and the Searles Lake Chemical Company have appealed from a decision of the Chief, Mineral Adjudication Unit, Los Angeles Land Office, dated September 29, 1960, dismissing their protests directed against the issuance of competitive sodium leases at Searles Lake, California, to the American Potash & Chemical Corporation and the Stauffer Chemical Company pursuant to their successful bids at a competitive sale conducted on November 28, 1958.

The gravamen of the protests and appeals is that issuance of leases to the successful bidders would create a monopoly and stifle competition.

The Department of Justice, having considered the same or similar charges, advised by letter of May 18, 1960 "that the granting of such leases would not in themselves result in violation of the antitrust laws." Further, it having been previously determined that leasing is in the best interest of the Government and that leases for the deposits should be issued to the successful bidders at a public competitive sale and no evidence being submitted justifying a change in that determination or a finding that the sale was conducted other than in accordance with the pertinent statute and regulations pertaining thereto, the protests were properly dismissed as being without merit. Leases to the successful lease applicants, all else being regular shall issue as soon as practicable.

The decision appealed from is affirmed.

Earl J. Thomas
Acting Director

Approved: December 28, 1960

George W. Abbott
Ast. Secretary of the Interior

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DISTRIBUTION:

Miller & Miller, Attorneys at Law (for appellants) (Regular Mail)
Mr. L. A. Adams, American Potash & Chemical Corporation (Regular Mail)
Stauffer Chemical Company (Regular Mail)
Minerals Staff Officer 5
Mr. Abernathy, Geological Survey 6
Geological Survey 10
Appeals List No. 1
BF
Oliver and Donnally (Regular Mail)

86223

DOCKET FILES

MINING CLAIMS * 3 Contests

RULES OF PRACTICE * 5 Government Contests

Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is not timely filed the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the Manager, and the Secretary is without authorization to waive the rules to permit the late filing of the answer.

U. S. v John Edward Mahan, Sacramento Contest No. 5544 (December16, 1960)

UNITED STATES
DEPARTMENT OF INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Sacramento Contest
No. 5544
5.04g
December 16, 1960
CERTIFIED MAIL
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Decision

: :

United States v. John Edward Mahan	: :	Hello Nos.1, 2, 3 and 4 Lode Mining Claimslocated in section 8, T. 15 N., R. 10 E., MDM, California

:

Decision Affirmed

Mr. Mahan has appealed from a decision of the Manager, Sacramento Land Office, dated July 7, 1959, declaring the Hello Nos. 1, 2, 3 and 4 lode mining claims null and void. The decision was premised on a finding that an answer to the complaint was not filed within 30 days after the service thereof and the failure to file a denial of the charges is considered an admission of the truth of the charges (that the land is nonmineral in character and a valid discovery has not been made within the limits of the claims).

The reasons on appeal ascribe no error in the decision appealed from. It is merely a recitation of certain circumstances thought mitigating by the appellant and a request for relief.

The departmental rules of practice provides that a contestee "must" file an answer within 30 days after service of a complaint upon him and that if an answer is not filed as required "the allegations of the complaint will be taken as admitted by the contestee" and the case decided without a hearing. 43 CFR, 1959 Supp., 221.64, 221.65. Further; the complaint served upon the contestee stated that:

> "Unless contestee files an answer to the complaint *** within thirty (30) days after service of this notice, the allegations of the complaint will be taken as confessed."

Since the answer was not filed within the time prescribed by the regulations, and the Bureau being bound by the existing regulations (McKay v. Wahlernmaier, 226 F.2d 35 (1955)), the Manager did properly take the allegations of the complaint as confessed and did correctly render decision declaring the claims null and void. U.S. v. J. Hubert Smith, 67 I.D. 311 (1960).

The Manager's decision is affirmed.

Mr. Mahan is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be computed on the basis of $5 for each mining claim included in the appeal. If the appeal covers all mining claims adversely affected by this decision the total filing fee is $20.00. In taking an appeal there must be strict compliance with the regulations.

Edward Woozley
Director

Enclosure

DISTRIBUTION:

Mr. Charles L. Gilmore, Attorney at Law
Mr. John Edward Mahan
Minerals Staff Officer 5
Appeals List No. 1
BF